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Supreme Court, U.S.
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In The

Supreme Court of the United States

BOARD OF EDUCATION OF
FAYETTE COUNTY, KENTUCKY,

Petitioner,

v.

L.M., as legal guardian for T.D.,
a minor; L.M., on her own behalf;
and T.D., by his legal guardian,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an administrative agency or trial court which awards compensatory education to a student for a violation of the student's rights under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, may order the student's parent(s) and employees of the local education agency to collaborate on the specific educational services which will be offered to satisfy the award or the duration of those services without offending other statutory provisions prohibiting an employee of the local education agency from serving as the administrative hearing officer.

2. Whether a requirement that an administrative agency which finds a violation of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, must also hear evidence prior to any allowance for an appeal, including judicial review, as to the speculated extent of the educational deficit caused by the violation and as to the speculated extent of compensatory education services which would alleviate this deficit, is contrary to the intent of the Act as stated therein and as previously determined by this Court.

PARTIES TO THE PROCEEDING

The Petitioner is the Board of Education of Fayette County, Kentucky, a body politic and corporate, the Plaintiff-Appellee below.

The Respondents are L.M., as legal guardian for T.D., a minor; L.M., on her own behalf; and T.D., by his legal guardian, the Defendants-Appellants below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
FEDERAL STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR ALLOWANCE OF THE WRIT	7
I. THE DECISION OF THE COURT OF APPEALS IMPOSES AN OBLIGATION ON SCHOOL DISTRICTS FOUND TO HAVE VIOLATED THE IDEA WHICH IS INCONSISTENT WITH THE INTENT AND SCOPE OF THE IDEA	7
II. THE DECISION OF THE COURT OF APPEALS MISCONSTRUES PROVISIONS OF THE IDEA, AND IN SO DOING ESTABLISHES AN UNWORKABLE PRECEDENT FOR FUTURE ADMINISTRATIVE PROCEEDINGS	11
CONCLUSION	17

TABLE OF CONTENTS – Continued

Page

APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit, filed March 2, 2007, and Judgment of the same date ..... App. 1

Memorandum Opinion and Order of the United States District Court, Eastern District of Kentucky, Lexington Division, entered March 7, 2006 ..... App. 23

Final Decision and Order of the Kentucky Department of Education, Division of Exceptional Children Services, Exceptional Children Appeals Board, rendered May 15, 2004 ..... App. 42

Final Decision and Order of the Hearing Officer, rendered January 30, 2004 ..... App. 74

Order of the United States Court of Appeals for the Sixth Circuit denying a petition for rehearing with suggestion for en banc review, filed July 5, 2007 ..... App. 179

TABLE OF AUTHORITIES

Page

CASES

Arlington Central Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. ___, 126 S.Ct. 2455, 165 L.Ed. 2d 526 (2006) 13

Barnes v. Gorman, 536 U.S. 181 (2002) 9, 10

Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982) 7, 9, 10, 16

Hall v. Knott Co. Bd. of Educ., 941 F.2d 402 (6th Cir. 1991) 5

Knable v. Bexley City School District, 238 F.3d 755 (6th Cir. 2001) 15

Reid v. District of Columbia, 401 F.3d 516 (D.C.Cir. 2005) 13, 14

Rich v. Kentucky Country Day, Inc., 793 S.W.2d 832 (Ky.App. 1990) 12

School Committee of the Town of Burlington, Mass. v. Dept. of Educ. of the Comm. of Mass., 471 U.S. 359 (1985) 4

STATUTORY PROVISIONS

20 U.S.C. § 1400 *et seq.*, Individuals with Disabilities Education Act ..... *passim*

20 U.S.C. § 1414(d)(1)(B) 5, 14

20 U.S.C. § 1415(b)(6) 4

20 U.S.C. § 1415(f)(3) (2004) 2, 3, 7, 14

20 U.S.C. § 1415(f)(3)(A)(i)(I) (2007) 14

TABLE OF AUTHORITIES – Continued

Page

20 U.S.C. § 1415(g) 5

20 U.S.C. § 1415(h)(4) 15

20 U.S.C. § 1415(i)(2) 6

20 U.S.C. § 1415(i)(2)(B)(iii) 2, 3, 6, 9, 15

28 U.S.C. §1254(1) 2

28 U.S.C. §2101(c) 2

29 U.S.C. § 794(a), § 504 of the Rehabilitation Act of 1973 9

42 U.S.C. § 12132, § 202 of the Americans with Disabilities Act of 1990 9

OTHER AUTHORITIES

34 C.F.R. §300.515(a) 16

Public Law 108-446, the Individuals with Disabilities Education Improvement Act of 2004 2

84 Stat. 175, Education of the Handicapped Act 8

Pub. L. 94-142, Education for All Handicapped Children Act 8

PETITION FOR WRIT OF CERTIORARI

Petitioner, Board of Education of Fayette County, Kentucky, respectfully petitions this Court for a writ of certiorari to review the March 2, 2007, Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, filed March 2, 2007, is officially reported at 478 F.3d 307, and is reproduced at App. 1 - 22.

The Memorandum Opinion and Order of the United States District Court for the Eastern District of Kentucky, Lexington Division, entered March 7, 2006, is unofficially reported at 2006 U.S. Dist. LEXIS 9106, and is reproduced at App. 23 - 41.

The Final Decision and Order of the Kentucky Department of Education, Division of Exceptional Children Services, Exceptional Children Appeals Board, rendered May 15, 2004, is unreported, and is reproduced at App. 42 - 73.

The Final Decision and Order of the Hearing Officer, rendered January 30, 2004, is unreported, and is reproduced at App. 74 - 178.

The Order of the United States Court of Appeals for the Sixth Circuit denying a petition for rehearing

with suggestion for en banc review, filed July 5, 2007, is unofficially reported at 2007 U.S. App. LEXIS 16863, and is reproduced at App. 179-181.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on March 2, 2007. App. 1. A petition for rehearing with suggestion for en banc review was timely filed, and was denied by Order entered July 5, 2007. App. 179. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rules 13.1 and 13.3 because it is being filed within 90 days of the date of the denial of rehearing. This Court has jurisdiction to review the Judgment of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1254(1).

FEDERAL STATUTES INVOLVED

The provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* (LEXIS 2004) at issue in this matter are § 1415(f)(3) and § 1415(i)(2)(B)(iii) and are set forth respectively below:[1]

[1] Congress amended the IDEA in Public Law 108-446, the Individuals with Disabilities Education Improvement Act of

(Continued on following page)

§1415. Procedural safeguards

. . . .

(f) Impartial due process hearing.

. . . .

(3) Limitation on conduct of hearing. A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.

. . . .

(i) Administrative procedures.

. . . .

(2) Right to bring civil action.

. . . .

(B) Additional requirements. In any action brought under this paragraph, the court –

. . . .

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

2004 (IDEIA), with re-codification but no substantive changes to the cited provisions in issue as presented in this Petition. The administrative proceeding below was initiated prior to the effective date of these amendments.

STATEMENT OF THE CASE

This matter was initiated at the administrative level in May 2003, through a request for a due process hearing on behalf of Respondent T.D., a minor, pursuant to 20 U.S.C. § 1415(b)(6), part of the procedural safeguards of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* An evidentiary hearing was held on non-consecutive days in September and October 2003, and the decision of the administrative hearing officer was rendered on January 30, 2004. App. 74. The hearing officer determined, *inter alia*, the local educational agency (LEA), the Petitioner Board of Education of Fayette County, Kentucky (hereinafter "School District"), violated the IDEA by failing to provide a free appropriate public education (FAPE) to Respondent T.D. during the 2001-02 and 2002-03 school years (third and fourth grade), and during the summer of 2003. App. 103, 117. This finding was not appealed by the School District.

As the remedy for this denial of FAPE for two school years and one summer, the administrative hearing officer ordered the School District to provide T.D. with compensatory education[2] in the form of

[2] "Compensatory education" is a judicially created phrase describing a form of equitable relief available to a student who has been denied a FAPE under the IDEA but whose parents either could not afford to or chose not to place the student in a private school pending an action for reimbursement of the costs of private education. *See School Committee of the Town of Burlington, Mass. v. Dept. of Educ. of the Comm. of Mass.*, 471

(Continued on following page)

"[o]ne hundred twenty-five hours of one-on-one instruction" and "[a]n additional number of hours equal to the number of hours" the student would have spent in a program during the summer of 2003. App. 154. Both the School District and T.D.'s guardian timely appealed from this portion of the hearing officer's decision pursuant to 20 U.S.C. § 1415(g) to a second tier administrative appeals panel comprised of three administrative hearing officers. In relation to the award of compensatory education, T.D.'s guardian sought a determination the specific award of one-hundred twenty-five hours was too little to address the perceived injury, and the School District sought a determination the specific award both as to duration and methodology was in excess of the hearing officer's authority. App. 58-59.

The administrative appeals panel, the Exceptional Children Appeals Board (ECAB), agreed the compensatory education award should be flexible and should neither be an hour-for-hour compensation for the number of hours of special education services the student was denied nor an arbitrary number of hours of compensatory education unsupported by any record evidence. App. 66. Instead, the ECAB ordered the School District and T.D.'s guardian to convene a meeting of the individualized education program team or "IEP Team," *see* 20 U.S.C. §1414(d)(1)(B), referred to in Kentucky as an admissions and release

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U.S. 359 (1985); *Hall v. Knott Co. Bd. of Educ.*, 941 F.2d 402 (6th Cir. 1991).

committee (ARC), in the same manner as is required to be convened for all identified special education students, to collaborate and determine the nature of special services necessary and appropriate for T.D. to overcome the deficits caused by the two year denial of FAPE. App. 70-72.

Following the entry of the ECAB decision, the School District and T.D.'s guardian each sought judicial review in the jurisdictionally appropriate United States District Court. The basis for this initial exercise of federal jurisdiction is 20 U.S.C. § 1415(i)(2). The School District sought review of issues not related to the manner in which the ECAB ordered the compensatory education award to be determined. T.D.'s guardian did seek review of this aspect of the ECAB decision. Upon review, the district court declined to alter the ECAB's decision on this issue, instead determining the compensatory education award to be appropriate pursuant to 20 U.S.C. §1415(i)(2)(B)(iii). Specifically, the district court found the ECAB's approach to a compensatory education remedy was "more innovative and likely to be more tailored to T.D.'s needs than an award of a particular number of hours predetermined without benefit of observing T.D.'s progression." App. 32.

T.D.'s guardian sought appellate review in the United States Court of Appeals for the Sixth Circuit, seeking, *inter alia*, a determination the ECAB decision resulted in a vague and unenforceable compensatory education award and a determination T.D. was entitled to hour-for-hour compensation for the

duration of the denial of FAPE. The Court of Appeals declined to endorse the request for hour-for-hour compensatory education reimbursement. App. 16. However, the Court of Appeals held the ECAB decision resulted in an improper delegation of authority by having employees of the School District play any role in determining the extent of compensatory education services, as 20 U.S.C. § 1415(f)(3) prohibits any employee of "the local educational agency involved in the education or care of the child" from serving as the hearing officer. App. 19.

The Court of Appeals reversed that portion of the district court's decision which endorsed the ECAB's compensatory education award, and remanded the matter "with instructions to have the appropriate administrative body craft" a compensatory education plan. App. 21.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IMPOSES AN OBLIGATION ON SCHOOL DISTRICTS FOUND TO HAVE VIOLATED THE IDEA WHICH IS INCONSISTENT WITH THE INTENT AND SCOPE OF THE IDEA.

In *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), in its first opportunity to interpret any aspect of the predecessor

to the IDEA,[3] this Court held Congress did not intend for states to be obligated to maximize each disabled child's potential commensurate with the opportunity provided other children. 458 U.S. at 198. Instead, this Court held the IDEA only requires the states to provide disabled students a "basic floor" of educational opportunity "sufficient to confer some educational benefit" on the student. *Id.* at 200. The Court of Appeals below, on the other hand, indicated the compensatory education award for Respondent T.D. should in some manner be related to the amount of services needed "in order to catch up to his peers." App. 17. In similar language, the Court of Appeals lamented that as of the date of oral argument below, no action had been taken to "remedy this deficiency" of T.D. reading "at only a fifth-grade level despite the fact he is now in the seventh grade." *Id.* Similarly, in rejecting T.D.'s argument that he is entitled to hour-for-hour reimbursement for the duration of the denial of FAPE, the Court of Appeals found "no basis" to conclude T.D. required hour-for-hour reimbursement in the form of "remedial instruction in order to arrive on an equal footing with his classmates." App. 17.

The Court of Appeals held a compensatory education award should be geared to producing particular results as speculated by an administrative hearing officer to have been attainable by the student had no

[3] The Education of the Handicapped Act (EHA), 84 Stat. 175, as amended by the Education for All Handicapped Children Act (EAHCA), Pub. L. 94-142 (1975).

violation of the IDEA occurred. However, this Court in *Rowley* disavowed any suggestion the IDEA requires school districts to guarantee educational achievement for disabled students, stating "the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." 458 U.S. at 192.

Moreover, the IDEA is spending clause legislation. *See e.g. Rowley*, 458 U.S. at 190 n11 ("Congress, when exercising its spending power, can impose no burden upon the States unless it does so unambiguously"). This Court, in *Barnes v. Gorman*, 536 U.S. 181 (2002), reiterated that spending clause legislation should be interpreted in the nature of a contract: in return for federal funds, State recipients agree to comply with federally imposed conditions. 536 U.S. at 186. Based on this reasoning, this Court declined to find an implied punitive damage provision in other spending clause legislation (§ 202 of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132; or § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a)), which, like the IDEA, provides a federal right of action in favor of persons with disabilities. 536 U.S. at 189. Extending the same holding to the IDEA requires the conclusion that the "appropriate" remedies authorized by 20 U.S.C. § 1415(i)(2)(B)(iii) may not be "punitive" in nature.

The decision of the Court of Appeals below imposes a standard for determining the scope of compensatory education based on a presumption the

student would have been educated commensurate with his non-disabled peers had no violation of the IDEA occurred. This results in a situation where a student who obtains an administrative or judicial determination of a violation of the IDEA has a right to receive greater educational services in compensation than he would have been entitled to receive had there been no violation of the IDEA. Such an award exceeds the obligation imposed on school districts by the IDEA, as interpreted by this Court in *Rowley*. Any award consistent with the opinion of the Court of Appeals below would be punitive against the affected school district rather than merely compensatory in favor of the student. Thus, such an award would be contrary to the holding in *Barnes* that punitive damages are not available under spending clause legislation absent an unambiguous indication by Congress of such a condition being imposed on the recipient of federal money.

Because the decision of the Court of Appeals below contemplates that compensatory education awards under the IDEA should be based on a higher standard of educational attainment than is required by the Act, the decision is inconsistent with this Court's decisions in *Rowley* and *Barnes* and must be corrected.

II. THE DECISION OF THE COURT OF APPEALS MISCONSTRUES PROVISIONS OF THE IDEA, AND IN SO DOING ESTABLISHES AN UNWORKABLE PRECEDENT FOR FUTURE ADMINISTRATIVE PROCEEDINGS.

The decision of the Court of Appeals below will require an administrative hearing officer to hear testimonial speculation on the specific educational deficit alleged to have resulted from a denial of a FAPE, and to hear testimonial speculation as to which compensatory measures might be necessary to address those deficits after the hearing officer concludes the evidence does support a finding of a denial of FAPE. There can be no direct evidence of either the educational deficit or the necessary compensatory measures to correct the deficit, as the former requires conjecture as to something which never occurred and the latter requires supposition as to what may be required in the future. However, a finding of fact in a judicial or quasi-judicial proceeding requires more evidentiary support than conjecture and supposition. Similarly, in the typical case, in order for compensatory relief to be awarded, the injury to the party must be demonstrated in the record, not merely speculative. And yet, the decision of the Court of Appeals below mandates that an administrative hearing officer render a decision based on guesswork as to both the extent of the injury to the student and the extent of the remedy necessary to alleviate this injury.

Kentucky does not recognize a cause of action for educational malpractice because educational achievement is "influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental, they may be present but not perceived, recognized but not identified." *Rich v. Kentucky Country Day, Inc.*, 793 S.W.2d 832 (Ky.App. 1990). This Court recognized the same limitation in *Rowley*, *supra*, discussing the "entirely unworkable standard requiring impossible measurements and comparisons" if school districts were required to guarantee a particular outcome for the services provided to each student. 458 U.S. at 198. Such a guarantee would be impossible, according to this Court, because "[t]he educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom." The same limitation on evidence of causation will exist for any hearing officer attempting to determine the extent of any educational deficits "caused" by a violation of the IDEA. The Court of Appeals decision requires of administrative hearing officers a task which this Court and an appellate court of this Commonwealth have determined to be impossible. If a hearing officer guesses incorrectly, the school district will be punished for educational deficits caused by factors other than violations of the IDEA. Only by the most remarkable of coincidences

will a hearing officer following the Court of Appeals decision below be able to craft a compensatory education plan which actually corresponds with a proven violation of the IDEA and its resultant educational deprivation.

Rarely will a disabled student's parent or guardian be an expert in disabilities or the impact of a disability on educational achievement, or in educational methodology, and these topics are not within the typical scope of lay witness opinion. Thus, the decision of the Court of Appeals also will require the use of expert witnesses to offer the conjecture and supposition required for a hearing officer to render a decision and craft a compensatory education award. This places an untenable burden on parents and school districts alike, as this Court has recently determined expert witness fees are not recoverable as costs to the prevailing party in an IDEA proceeding. *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. ___, 126 S.Ct. 2455, 165 L.Ed. 2d 526 (2006). Moreover, there is simply nothing in the IDEA which demands that a school district be obligated to educate a student sufficiently to satisfy an educational expert's rank speculation as to the student's potential for educational achievement.

The Court of Appeals' rejection of the administrative decision in regard to the manner of crafting a compensatory education award results from its adoption of the reasoning of the United States Court of Appeals for the District of Columbia Circuit in *Reid v. District of Columbia*, 401 F.3d 516 (D.C.Cir. 2005).

The *Reid* Court, in turn, based its decision on a misreading and misapplication of the relevant provision of the IDEA. 20 U.S.C. § 1415(f)(3)[4] prohibits from serving as a hearing officer any "employee of the State educational agency or the local educational agency involved in the education or care of the child." The *Reid* Court determined the method used by the ECAB for the development of a compensatory education plan would result in the delegation to employees of the School District the authority to render a decision in the administrative proceeding. 401 F.3d at 526. The ECAB's method was to require a committee comprised of school employees, T.D.'s guardian, and others (*see* 20 U.S.C. § 1414(d)(1)(B)) to collaborate on the nature and the extent of compensatory education services to remedy the concluded denial of a FAPE for two school years. However, this strategy does not result in any School District employee performing any of the statutory duties of a hearing officer under the IDEA.

The hearing officer rendered the decision as to the duration of the School District's violation of the IDEA, and this determination was affirmed by the ECAB. By the time the committee would have begun the collaboration on the specific nature of the remedy,

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[4] By the 2004 amendments to the IDEA, the quoted provision was re-codified as § 1415(f)(3)(A)(i)(I). Because this matter was initiated prior to the effective date of the 2004 amendments, the parties have continued to reference the statutes as enacted at that time.

the hearing officer would have already fulfilled the requirements of 20 U.S.C. § 1415(h)(4) to provide written "findings of fact and decisions." Requiring the parties to engage in collaboration on the nature and duration of the relief to be provided was well within the hearing officer's authority to grant the relief which she determined to be "appropriate." *See* 20 U.S.C. § 1415(i)(2)(B)(iii). The contrary finding by the Court of Appeals results in the untenable requirement for the hearing officer to include in these "findings of fact and decisions" the conclusions drawn from rank speculation as to both the educational deficit caused by the school district and the services required to remedy this guessed-at deficit.

The Court of Appeals decision will also require administrative hearings under the IDEA to be bifurcated in order to avoid confusion of the issues. The parties would first present evidence to the hearing officer as to the alleged procedural violations of the IDEA and whether each such violation caused substantive harm so as to give rise to a remedy. *See, e.g., Knable v. Bexley City School District*, 238 F.3d 755, 766 (6th Cir. 2001) (only procedural violations which result in the loss of educational opportunity constitute a denial of a FAPE under IDEA). Then, only after the hearing officer has determined which alleged procedural violations actually resulted in a denial of FAPE, would the parties be able to speculate as to the extent of the harm caused by a particular violation and as to the remedies necessary to address that harm. This would be utterly impossible within

the framework established by the United States Department of Education in imposing on a hearing officer only forty-five (45) days in which to conduct a hearing and render a final decision. 34 C.F.R. §300.515(a). By implicitly adding a procedural step in which a hearing officer must render a preliminary decision regarding findings of fact and conclusions as to which alleged procedural violations both occurred and caused substantive harm, prior to hearing speculation as to the extent of the educational deficit and the necessary services to remedy the deficit, the Court of Appeals has misinterpreted relevant statutory provisions, has imposed upon hearing officers a duty to make findings of fact based on rank speculation, and has rendered the administrative hearing process under the IDEA truly unworkable.

Under the IDEA, even an appropriately drafted and implemented educational program for a student with a disability does not create contract rights for the student. Again, as held in *Rowley*, *supra*, all that is required is for a school district to provide a basic floor of opportunity and to confer some educational benefit on a disabled student. Thus, if a student's educational program has as a long term goal the student's graduation from high school, and the student reaches the age at which the student is no longer eligible for special education services under the IDEA without having graduated, the student may not sue for "specific performance" in order to remain in school until the student graduates. Instead, in order to obtain any additional schooling, the student

must show the school district failed to provide a basic floor of opportunity and failed to confer any educational benefit. In contrast, however, the Court of Appeals decision below does confer upon disabled students a remedy akin to "specific performance." It is simply contrary to the intent of the IDEA to require a school district to provide educational services specifically designed to reach a particular educational outcome as designated by an administrative hearing officer when the IDEA confers no right to a specific educational outcome on disabled students.

By creating these numerous complications due primarily to a misinterpretation of relevant statutory provisions, and secondarily to a failure to acknowledge this Court's determination of the intent of the IDEA, the Court of Appeals has erroneously decided an important question of federal law on an issue that should be settled by this Court.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit imposes a duty on school districts found to have violated the IDEA which is inconsistent with the intent and scope of the IDEA and otherwise misconstrues provisions of the IDEA thereby establishing an unworkable precedent for administrative proceedings. This Court is earnestly

urged to grant this Petition for Writ of Certiorari to address these important questions of federal law.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

BOARD OF EDUCATION OF FAYETTE COUNTY, KENTUCKY

Plaintiff-Appellee,

v.

L.M., as legal guardian of T.D., a minor; L.M., on her own behalf; and T.D., by his legal guardian,

Defendants-Appellants.

No. 06-5534

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 04-00266 – Jennifer B. Coffman, District Judge.

Argued: February 2, 2007

Decided and Filed: March 2, 2007

Before: MARTIN, COLE, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Marie Allison, ASSISTANT PUBLIC ADVOCATE, Lexington, Kentucky, for Appellants. Robert L. Chenoweth, CHENOWETH LAW OFFICE, Frankfort, Kentucky, for Appellee. **ON BRIEF:** Marie Allison, ASSISTANT PUBLIC ADVOCATE, Lexington,

Kentucky, for Appellants. Robert L. Chenoweth, CHENOWETH LAW OFFICE, Frankfort, Kentucky, for Appellee.

OPINION

RONALD LEE GILMAN, Circuit Judge. This appeal is brought by a child with a disability within the meaning of the Individuals with Disabilities Education Act (IDEA). For the reasons set forth below, we **AFFIRM** the judgment of the district court insofar as it upheld the hearing officer's determination regarding the extent of the School District's violation of the IDEA, but **REVERSE** the court's affirmation of the compensatory-education award and **REMAND** the case with instructions to have the appropriate administrative body craft a remedy that complies with the IDEA.

I. BACKGROUND

T.D., a minor child, attended preschool and elementary school through the fourth grade under the jurisdiction of the Board of Education of Fayette County, Kentucky (the School District). He exhibited behavioral and academic problems beginning in kindergarten, but was not identified by the School District as a child with a disability within the meaning of the IDEA until May of 2003, just prior to the conclusion of T.D.'s fourth-grade school year. L.M., the

child's legal guardian, requested a due process hearing pursuant to the IDEA, which was held by an impartial hearing officer in January of 2004. The hearing officer found that the child was denied a free appropriate public education (FAPE) for his third- and fourth-grade school years (2001-2002 and 2002-2003) due to the School District's failure to refer T.D. for special education after his second-grade year. To remedy this denial, the hearing officer awarded T.D. a compensatory-education package that included 125 hours of specified one-on-one instruction in reading and language skills.

The Exceptional Children's Appeals Board (Appeals Board) affirmed the hearing officer's finding that the child was denied a FAPE for the two years in question, but reversed the hearing officer's award of 125 hours of compensatory education in favor of a more fluid determination of appropriate compensatory education to be prepared by the child's Admissions and Release Committee (Committee). In Kentucky, this Committee is the equivalent of a student's Individualized Education Program (IEP) team under the IDEA.

T.D. was born in February of 1993 and attended elementary school in Fayette County from 1998 through 2003. He was referred for evaluation as a student with possible disabilities under the IDEA in January of 2003, during his fourth-grade school year. The School District conducted a comprehensive evaluation of T.D. shortly thereafter, and the Committee met on May 5, 2003 to review and act on the

results of that evaluation. Among other things, the Committee determined that T.D. had been medically diagnosed with attention deficit hyperactivity disorder (ADHD) and that he also met the IDEA eligibility requirements for a reading disability.

The School District does not dispute T.D.'s eligibility under the IDEA. T.D. and his guardian, however, argued before the hearing officer that the School District should have referred T.D. for a disability evaluation under the IDEA's "child-find procedures" as early as kindergarten. Report cards from the first two grading periods of T.D.'s kindergarten year showed that T.D. struggled with behavioral and social skills, beginning language skills, and math. But by the end of T.D.'s kindergarten year, he was meeting expectations in all academic areas, even though he still exhibited behavioral problems. T.D.'s behavioral problems continued for the next three years, and he began experiencing severe academic problems as well. For example, his standardized test scores at the end of the second grade indicated that T.D. was reading "far below grade level" and was considered "at risk." His second-grade teacher requested assistance from a reading specialist and the school's psychologist, and discussed the possibility of a reading disability with the principal. The teacher did not, however, refer T.D. for a formal evaluation under the IDEA.

After T.D. completed the third grade, he was still reading far below grade level. The third-grade teacher recommended that T.D. repeat that grade. His guardian objected, however, and he was promoted

to fourth grade. But T.D. attended summer school between the third and fourth grades under the School District's Extended School Services program.

In September of 2002, T.D.'s guardian notified the school that T.D. had been medically diagnosed with ADHD. The school principal then referred T.D. for an IDEA evaluation in November of that year. In February of 2003, the Committee determined that the referral was appropriate and warranted a full evaluation, which was completed in April of 2003. The Committee reviewed T.D.'s evaluation and met on May 5, 2003 to devise a plan of action. At the meeting, the Committee determined that T.D. met the eligibility requirements for special education due to several disabilities, including his ADHD. The Committee held several meetings during May of 2003 to develop T.D.'s IEP. T.D.'s guardian, unhappy with the IEP as well as the timing of T.D.'s referral for special education, requested a due process hearing pursuant to the IDEA. The hearing officer conducted hearings throughout the fall of 2003 and rendered a written decision on January 30, 2004.

In her decision, the hearing officer concluded that the School District's failure to refer T.D. for a special-education evaluation in the second grade deprived him of a FAPE in the third and fourth grades: "This failure resulted in a loss of educational opportunity and constituted a denial of a FAPE." The hearing officer further concluded that the School District's failure to provide individualized Extended School Year (ESY) instruction during the summer of 2003

also constituted the denial of a FAPE. To remedy these violations, the hearing officer awarded T.D. 125 hours of compensatory education, consisting of one-on-one instruction in reading and language skills, as well as an "additional number of hours equal to the number of hours that [T.D.] would have been eligible for ESY, had the [Committee] considered and determined the need for ESY services in the Summer of 2003." Moreover, the hearing officer ordered the School District to invite T.D.'s private psychologist to the Committee meeting and to pay for the psychologist's attendance.

The School District appealed to the Appeals Board, which agreed with the hearing officer's factual findings but altered the remedy. Instead of requiring a certain number of hours of compensatory education, the Appeals Board "ordered T.D.'s [Committee] to prepare and carry out a plan for providing T.D. with compensatory education services and to meet as required to review and modify the plan, not less than once every twelve months, until the [Committee] determines that the award is fulfilled."

Unhappy with the Appeals Board's decision, the School District filed an action in federal district court, challenging the following two determinations made by the hearing officer and affirmed by the Appeals Board: (1) that T.D. was entitled to ESY instruction for the summer of 2003, and (2) that the School District pay for T.D.'s private psychologist to attend the Committee meeting. T.D. and his guardian asserted 11 counterclaims, 2 of which are the sole issues

now on appeal: (1) that the School District denied a FAPE to T.D. during the 1999-2000 and 2000-2001 school years – T.D.'s first- and second-grade years, respectively – as well as during the summer of 2002, and (2) that the limited nature of the compensatory-education award with respect to the 2001-2002 and 2002-2003 school years and the summer of 2003 denied T.D. meaningful relief. The district court affirmed the Appeals Board's decision in its entirety. T.D. and his guardian timely appealed.

II. ANALYSIS

A. Standard of review

In a lawsuit brought to challenge an IDEA administrative finding, the district court "(i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C). "The Supreme Court has construed this provision to mean that an initial reviewing court should make an independent decision based on the preponderance of the evidence but also should give 'due weight' to the determinations made during the state administrative process." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 849 (6th Cir. 2004) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982)).

A district court thus reviews IDEA cases under a modified de novo standard, meaning that it may set aside administrative findings in an IDEA case "only if the evidence before the court is more likely than not to preclude the administrative decision from being justified based on the agency's presumed educational expertise, a fair estimate of the worth of the testimony, or both." *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 519 (6th Cir. 2003) (citation and quotation marks omitted). More weight "is due to an agency's determinations on matters for which educational expertise is relevant." *Deal*, 392 F.3d at 849.

On appeal, we will reverse the district court's findings of fact only if they are clearly erroneous. *Id.* at 850. The district court's conclusions of law, however, are reviewed de novo. *Id.* Finally, "[m]ixed questions of law and fact, including the question of whether a child was denied a FAPE, are reviewed de novo," although the panel should accord "due deference to the state administrative hearing officer's decision." *Id.*

B. Timing of referral for IDEA eligibility

T.D. and his guardian first argue that the district court and the Appeals Board erred by failing to find that T.D. was denied a FAPE during the 1999-2000 and the 2000-2001 school years – his first and second grades. They also assert that T.D. was entitled to ESY instruction during the summer of 2002. The hearing officer found that the School District should

have referred T.D. for evaluation in the second grade, and that the failure to do so resulted in the denial of a FAPE for only his third- and fourth-grade years. This finding was affirmed by both the Appeals Board and the district court.

The IDEA imposes a "child-find" requirement on the states: their schools must have policies and procedures in place to identify, locate, and evaluate children with disabilities who need special education and related services. 34 C.F.R. § 300.111(a)(1). Even children who are only suspected of having a disability, although they are progressing from grade to grade, are protected by this requirement. 34 C.F.R. § 300.111(c). T.D. and his guardian argue that the School District's failure to evaluate T.D. as early as kindergarten constituted a procedural violation of the IDEA child-find requirement that resulted in substantive harm to T.D.

A school district may be held liable for procedural violations of the IDEA that cause substantive harm to the student. *Metro. Bd. of Pub. Ed. v. Guest*, 193 F.3d 457, 464 (6th Cir. 1999). What a claimant must show to establish a procedural violation is a matter of first impression in this circuit. We now adopt the standard first articulated in *Clay T. v. Walton County Sch. Dist.*, 952 F. Supp. 817, 823 (M.D. Ga. 1997), which provides that the claimant "must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate."

This standard was also adopted by the district court below.

1. First- and second-grade FAPE claim

The district court affirmed the Appeals Board's finding that the appropriate time for a referral was at the end of T.D.'s second-grade school year. It reasoned that "[i]t is difficult to assess whether a very young child is disabled or merely developing at a rate different from his peers, and the educational experts involved all seem to indicate that a hasty referral for special education can be damaging to a child." On appeal, T.D. and his guardian offer an exhaustive review of T.D.'s educational and behavioral problems in support of their contention that the School District ignored "clear signs" of his ADHD and reading disability as early as kindergarten. None of this evidence, however, is new information that the hearing officer did not already consider, nor does any of it show why the hearing officer's factual findings are clearly erroneous. An educational expert testified that T.D.'s performance in kindergarten should not have caused teachers to "jump to conclusions." The hearing officer, and later the Appeals Board, also gave due weight to expert testimony concluding that "the nature of ungraded primary school recognizes the progress of very young students is not uniform."

As the hearing officer noted, virtually all of the witnesses who testified at the due process hearing, including T.D.'s own expert, stated that T.D.'s

difficulties would not necessarily indicate a disability or a need for special education, and that it would be inappropriate to rush to identify a child that young as disabled. School personnel similarly testified that T.D.'s behavioral and learning problems were not atypical of immature young boys.

The School District did not ignore T.D.'s early problems. It took appropriate action by implementing specialized reading instruction, Reading Recovery Program participation, and behavior-management strategies. Under the IDEA, the School District was required to provide a basic floor of educational opportunity consisting "of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley,* 458 U.S. at 201. There is no additional requirement, however, "that the services so provided be sufficient to *maximize* each child's potential commensurate with the opportunity provided other children." *Id.* at 198 (citation and quotation marks omitted) (emphasis added). The School District provided additional services designed to aid T.D. in catching up to his peers in kindergarten and first grade, even though at that point he was not identified as being disabled within the meaning of the IDEA.

We agree with the district court that these services provided a basic floor of educational opportunity through T.D.'s second-grade school year. The interventions in kindergarten and first grade were moderately successful, at least during those years. By the end of kindergarten, for example, T.D. was meeting

expectations in all academic areas. T.D. did not start to fall significantly below grade level until the middle of his second-grade year. No teacher suggested that he repeat a school year until after the third grade. In short, nothing in the record compels the conclusion that the School District either overlooked clear signs of disability before T.D. entered second grade or had no rational justification for failing to evaluate him prior to that time. *See Clay,* 952 F. Supp. at 823.

2. ESY instruction during the summer of 2002

T.D. and his guardian also contend that T.D. was entitled to ESY instruction during the summer of 2002, following his third-grade year. In lieu of ESY, T.D. received summer school instruction through the School District's Extended School Services program. Extended School Services are available to students with or without disabilities. There is no evidence in the record regarding the nature of the instruction provided to T.D. that summer.

Under the IDEA, schools are required to provide Extended School Services as necessary in order to provide a child with a FAPE. 34 C.F.R. § 300.106(a). A school must provide these services, however, only if the child's IEP team determines that such services are necessary "for the provision of FAPE to the child." *Id.* But a claimant seeking an ESY must satisfy an even stricter test, because "providing an ESY is the exception and not the rule under the regulatory

scheme." *Cordrey v. Euckert,* 917 F.2d 1460, 1473 (6th Cir. 1990). This court has held that the burden is on the claimant proposing an ESY to demonstrate, in a particularized manner relating to the individual child, that an ESY is necessary to avoid regression so severe that the child would not be able to catch up during the following school year. *Id.* "If the child benefits meaningfully within his potential from instruction under a proper IEP over a regular school year, then ESY service may not be required under the Act unless the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an ESY." *Id.* (brackets and quotation marks omitted). A claimant must show, in other words, that "an ESY is necessary to permit the child to benefit from his instruction." *See id.* (brackets and quotation marks omitted). Claimants can rely on expert opinion testimony to make this showing and are not required to present empirical proof of actual prior regression. *Id.* at 1471-72.

T.D. and his guardian have offered no evidence that the Extended School Services T.D. received in the summer of 2002 were in any way inappropriate or insufficient to meet his needs. They instead make a conclusory statement that the record "clearly establishes" that T.D. was in need of specialized ESY instruction during that summer. T.D. and his guardian also argue that because the hearing officer found that there was evidence of regression entitling T.D. to ESY instruction for the summer of 2003 (and that evidence of regression was cumulative from kindergarten on),

ipso facto he was also entitled to ESY instruction during the summer of 2002. We reject this argument as inappropriate bootstrapping.

In any event, as noted by the district court, because T.D. has already received an award of compensatory education, a further award "based on the School District's failure to identify T.D. as a child with a disability after T.D.'s second-grade year would be premature at this point." T.D. and his guardian have failed to demonstrate that T.D. needed ESY instruction (instead of the Extended School Services that he did receive) during the summer of 2002 in order to benefit from the instruction provided to him during the previous school year. The hearing officer found that T.D.'s regression was cumulative from kindergarten on, but did not find that the regression during the summer of 2002 was severe enough to warrant the award of an ESY. T.D. and his guardian have offered no evidence in support of their claim to the contrary. Because T.D. and his guardian have not met their burden of showing why the exceptional remedy of ESY instruction was necessary, we will not disturb the district court's ruling on this ground.

C. Procedure for determining a compensatory-education award

In fashioning a remedy for the School District's denial of a FAPE for T.D.'s third- and fourth-grade school years, as well as for the summer following his fourth-grade year, the Appeals Board ordered T.D.'s

Committee to prepare a plan for providing compensatory education to the student. The Appeals Board also ordered the Committee to meet periodically, not less than once every 12 months, to review and modify the plan until the Committee determines that the compensatory-education award had been fulfilled.

On appeal, T.D. and his guardian argue that this remedy is "vague, unenforceable," and "allows the school district to determine the remedy for its wrongdoing." They instead seek hour-for-hour compensation for each hour of the school day for the four years that T.D. was allegedly denied a FAPE (1,050 hours per year), plus hour-for-hour compensation for the alleged denial of specialized ESY instruction during the summers of 2002 and 2003 (325 hours per summer). Because we agree with the district court that T.D. was denied a FAPE for two years plus one summer, an hour-for-hour award would equal 2,425 hours (1,050 hours per year for two years plus 325 hours for the summer of 2003).

An award of compensatory education is an equitable remedy that a court can grant as it finds appropriate. 20 U.S.C. § 1415(i)(2)(C)(iii); *see also Park ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1034 (9th Cir. 2006) ("The courts have discretion on how to craft the relief and there is no obligation to provide a day-for-day compensation for time missed.") (citation and quotation marks omitted). We review the award granted by the Appeals Board and affirmed by the district court under an abuse-of-discretion standard. *See Park*, 464 F.3d at 1033.

The Appeals Board awarded compensatory-education services that it deemed sufficient to remedy the denial of a FAPE to T.D. for two years – covering his third and fourth grades – plus an additional award of time to cover the ESY instruction that he was entitled to but denied during the summer of 2003. Instead of ordering a specific number of hours as the hearing officer had done, however, the Appeals Board left it to T.D.'s Committee to determine the particular services necessary to remedy the denial of his FAPE. The Appeals Board reasoned that the total number of hours awarded was less important than "the amount of extra services that [T.D.] will receive in a specific week, or over school breaks and the form of such services." In affirming the award, the district court described the plan as "innovative and likely to be more tailored to T.D.'s needs than an award of a particular number of hours predetermined without benefit of observing T.D.'s progression."

We agree with the district court and the Appeals Board that a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address T.D.'s educational problems successfully. *See Reid ex rel. Reid v. Dist. of Columbia,* 401 F.3d 516, 524 (D.C. Cir. 2005) (rejecting an hour-for-hour compensatory-education award in favor of a more flexible approach because some students may need only "short, intensive compensatory programs" while others may need extended programs that would exceed "hour-for-hour replacement of time spent without FAPE"). An appropriate award of

compensatory education is "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist., No. 3,* 31 F.3d 1489, 1497 (9th Cir. 1994).

T.D. may well need more than the 125 hours of compensatory education initially awarded by the hearing officer, but nothing in the record suggests that he needs hour-for-hour compensation in order to catch up to his peers. No one disputes that T.D. is a child of at least average intelligence. He has been shown to have an IQ score of 105. On the other hand, T.D.'s counsel stated at oral argument that this child reads at only a fifth-grade level despite the fact that he is now in the seventh grade. Although we are dismayed that no one has yet acted to remedy this deficiency during the two and a half years of pending litigation, we find no basis to claim that T.D., a child of average intelligence, needs over 2,400 hours of remedial instruction in order to arrive on an equal footing with his classmates. Such an award, in the absence of strong evidence in the record suggesting that so drastic a remedy is necessary, would border on punishment to the School District rather than an equitable remedy for a child in need. *See Reid,* 401 F.3d at 518 ("[C]ompensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.").

T.D. and his guardian also object to the Appeals Board's resolution on the basis that remanding the

details of the compensatory-education award to T.D.'s Committee improperly allows the School District to determine the remedy for its own wrongdoing. This raises the fundamental issue of whether the details of a compensatory-education award can be remanded to the Committee and still comply with the statutory scheme of the IDEA. We review issues of statutory construction de novo. *United States v. Blood,* 435 F.3d 612, 618 (6th Cir. 2006). Although there is no Sixth Circuit precedent on point, a recent case from the District of Columbia Circuit, *Reid, supra,* is instructive.

In *Reid,* the hearing officer awarded the student in question 810 hours of compensatory education to remedy the school district's denial of a FAPE for four and a half years. 401 F.3d at 518. He also vested the student's IEP team with the power to reduce or discontinue compensatory services if and when the IEP team determined that the student either no longer needed or was no longer benefitting from the compensatory education. *Id.* Specifically, "[t]he team's decision that [the student] no longer needs or is not benefitting from this award of compensatory education services will terminate this award." *Id.* at 520. The district court affirmed. *Id.* On appeal, the District of Columbia Circuit reversed the district court's ruling, holding that, under the IDEA, hearing officers may not authorize IEP teams to reduce or discontinue awards of compensatory education. *Id.* at 526.

The *Reid* court began its analysis by noting that "IDEA due process hearings 'may not be conducted by

an employee of the State educational agency or the local educational agency involved in the education or care of the child.'" *Id.* (citing 20 U.S.C. § 1415(f)(3)). An IEP team, in contrast, is statutorily *required* to include a representative of the local educational agency. 20 U.S.C. § 1414(d)(1)(B)(iv). Because the IEP team was delegated the power to reduce or terminate the compensatory-education award initially set by the hearing officer, the court held that "the IEP team would in effect exercise the officer's powers." *Reid,* 401 F.3d at 526. "In sum, while the IEP team certainly must monitor [the student's] progress and coordinate compensatory relief with his current IEP, a delegation that permits the team to reduce or terminate his awarded amount of compensatory education exceeds the statute's bounds." *Id.* at 527. The fact that the IEP team was also comprised of nonemployees, including the student's mother, did not change the court's ultimate conclusion. *Id.* at 526. "Under the statute, the hearing officer may not delegate his authority to a group that includes an individual specifically barred from performing the hearing officer's functions." *Id.*

Certainly one could make the argument that because an IEP is comprised of a number of individuals, only one of which must be a representative from the School District, that the School District does not have control over the actions of the IEP team and therefore is not really performing the hearing officer's functions. But we believe that the *Reid* court takes the better approach, creating a clean and clear

separation by barring altogether an IEP team's power to terminate a compensatory-education award. Under the statute, an IEP team consists of the disabled child's parents, at least one of the child's regular education teachers, at least one special education teacher of the child, a representative of the local educational agency (here, the School District), "an individual who can interpret the instructional implications of evaluation results," other individuals who have knowledge or special expertise regarding the child, and finally, "whenever appropriate, the child with a disability." 20 U.S.C. § 1414(d)(1)(B). When the child is still enrolled in the school district that caused the violation, then, his IEP team may consist of three or more employees of that school district – potentially half of the IEP team. T.D. is not currently enrolled in the School District, so the possibility of the School District exerting an undue influence in his particular case is not great, but we decline to approve a practice that might have such an impermissible effect in the future. We therefore hold that neither a hearing officer nor an Appeals Board may delegate to a child's IEP team the power to reduce or terminate a compensatory-education award.

In the present case, the Appeals Board awarded "[t]wo years of compensatory education for the District's delay in identifying and providing education services to the student," as well as an additional award to compensate for the ESY instruction that T.D. should have received in the summer of 2003. The Appeals Board also authorized T.D.'s Committee to

determine when the compensatory education award has been fulfilled. As previously noted, an Admissions and Release Committee in Kentucky is synonymous with an IEP team. *See* 707 Ky. Admin. Regs. 1:320. This case is therefore materially indistinguishable from *Reid*. Because we believe that *Reid* was correctly decided, we reverse the compensatory-education award and remand the case to the district court with instructions to reconsider the remedy awarded in a manner consistent with the foregoing analysis.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court insofar as it upheld the hearing officer's determination regarding the extent of the School District's violation of the IDEA, but **REVERSE** the court's affirmation of the compensatory-education award and **REMAND** the case with instructions to have the appropriate administrative body craft a remedy that complies with the IDEA.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-5534

BOARD OF EDUCATION OF FAYETTE COUNTY, KENTUCKY,
Plaintiff-Appellee,

v.

L.M., as legal guardian of T.D., a minor; L.M., on her own behalf; and T.D., by his legal guardian,
Defendants-Appellants.

(Filed Mar. 2, 2007)

Before: MARTIN, COLE, and GILMAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Kentucky at Lexington.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART, REVERSED IN PART, and the case is REMANDED for further proceedings consistent with the opinion of the court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

CIVIL ACTION NO. 04-266-JBC

BOARD OF EDUCATION OF FAYETTE COUNTY, KENTUCKY, PLAINTIFF,

V. MEMORANDUM OPINION AND ORDER

L.M., as Legal Guardian of T.D., a minor, et al., DEFENDANTS.

(Filed Mar. 7, 2006)

* * *

This action is before the court upon the parties' briefs (DE 27, 31) appealing various determinations by the Exceptional Children's Appeal Board ("ECAB"). For the reasons that follow, this court will affirm all of these decisions.

T.D. was identified as a child with a disability just prior to the conclusion of the 2002-2003 school year. The parents of T.D. asserted their right to a due process hearing on May 13, 2002, pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.* The hearing was held and a decision entered by an Impartial Hearing Officer ("IHO") on January 30, 2004. The IHO found that T.D. was denied Free Appropriate Public Education ("FAPE") for his third- and fourth- grade years (2001-2002 and 2002-2003) due to the Board's failure to

refer T.D. for special education after his second-grade year. The IHO further awarded 125 hours of compensatory education to T.D., consisting of one-on-one instruction in reading and language skills. The IHO further found that T.D. was entitled to compensatory education for the Board's failure to provide the student with any type of extended-school-year ("ESY") service in the summer of 2003. The IHO also ordered the Board to invite T.D.'s private psychologist to the Admission and Release Committee ("ARC") meeting and to pay a reasonable fee to procure the psychologist's attendance, if necessary. The decision was appealed to the ECAB. The ECAB entered its decision on May 14, 2004, affirming the decision of the IHO in large part, but altering the award to the student. The ECAB ordered compensatory education for two years due to the Board's delay in identifying T.D. as disabled and providing T.D. with special education services, and it awarded compensatory education for the summer of 2003, because the student should have received ESY services that summer. Rather than award a particular number of hours of compensatory education, the ECAB ordered T.D.'s ARC to prepare and carry out a plan for providing T.D. with compensatory education services and to meet as required to review and modify the plan, not less than once every twelve months, until the ARC determines that the award is fulfilled.

This action was brought by the Board of Education of Fayette County, Kentucky, to appeal two determinations made by the IHO and affirmed by the

ECAB. First, the plaintiff appeals the ECAB's determination that the child, T.D., is entitled to ESY Services for the summer following the 2002-2003 school year. The plaintiff also appeals the ECAB's determination that the child's private psychologist's attendance is required at the ARC meeting and that the Board is responsible for obtaining and compensating the psychologist's attendance.

The defendants have asserted eleven counterclaims, challenging various findings by the ECAB and details of T.D.'s individualized education program ("IEP"). First, the defendants claim that the ECAB's order requiring the ARC to prepare a plan for providing compensatory education for two years and one summer did not provide a meaningful mechanism for resolving the issues in dispute and that the order should have contained a specific number of hours of compensatory education. The defendants' second counterclaim asserts that the ECAB erred by failing to find that the student was denied FAPE in the first and second grades due to the Board's failure to identify the student as a child with a disability. Counterclaim three asserts that the Board denied T.D. FAPE by failing to provide sufficiently tailored ESY, with full parental participation, for the summers of 2000, 2001, and 2002. In counterclaim four, the student argues that the Board failed to provide placement in the least restrictive environment ("LRE"). The defendants claim that failure to include a math goal in T.D.'s IEP denied T.D. of FAPE as counterclaim five. Counterclaim six states that the student's IEP was

also deficient due to its exclusion of a behavioral strategy. T.D.'s parents' assertion that they were denied meaningful participation in planning behavioral strategies is the basis for counterclaim seven. T.D. challenges the ECAB's determination that the details of T.D.'s behavioral intervention plan ("BIP") are part of a teaching methodology in counterclaim eight. Counterclaim nine states that the school district's "child find" procedures were inadequate. In counterclaim ten, the defendants allege that the behavior goals listed in the IEP are too vague. Finally, counterclaim eleven cites as error the omission of the expected duration and start date from T.D.'s IEPs.

Standard of Review

The district court reviews determinations by the ECAB under a "modified de novo standard of review." *Bd. of Educ. v. Rowley,* 458 U.S. 176, 206 (1982). The standard of review for an IDEA action is outlined at 20 U.S.C. § 1415(I)(2)(B)(iii), which states that the court shall base its decision on the preponderance of the evidence and may award the relief that the court deems appropriate. The Sixth Circuit Court of Appeals has interpreted the statute to require the district court to give deference to determinations of the ECAB regarding credibility and requiring educational expertise. *N.L. v. Knox Co. Sch.,* 315 F.3d 688 (6th Cir. 2003); *Tucker v. Bd. of Educ.,* 136 F.3d 495 (6th Cir. 1998). The court determines whether the state has complied with the procedures set forth in

IDEA and whether the IEP developed through those procedures is reasonably calculated to enable the child to receive educational benefits. *Burilovich v. Bd. of Educ.*, 208 F.3d 560, 565 (6th Cir. 2000). The administrative findings in an IDEA case may be set aside only if the evidence before the court is more likely than not to preclude the administrative decision from being justified based on the agency's presumed educational expertise, a fair estimate of the worth of the testimony, or both. *Id.* at 567.

Legal Analysis

Plaintiff's Claim I: Summer 2003 ESY Services

ESY services are required only if a child's IEP team determines that such services are necessary. 34 C.F.R. § 300.309. As T.D. was identified as a child with a disability just prior to the conclusion of the 2002-2003 school year, there was no IEP team determination regarding ESY made prior to the summer. While an ARC was convened in early 2003, no IEP goals were agreed upon prior to the conclusion of the 2002-2003 school year. The legal standard for determining whether ESY is appropriate requires evaluating whether ESY would prevent significant regression of skills. *Cordrey v. Eukert,* 917 F.2d 1460 (6th Cir. 1990); *D.M v. Sch. Dist.*, 303 F.3d 523 (4th Cir. 2002). The court must inquire whether the benefits accrued to the student during the school year would be significantly jeopardized absent ESY. *Alamo*

Heights Ind. Sch. Dist. v. Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986). While all agree that T.D. has a history of problems with recoupment and regression in his regular education classes, the plaintiff argues that the legal standard requires that the evidence must show regression *related to* established IEP goals. As there were no such goals established prior to the summer of 2003, no evidence of that kind was available. Furthermore, the plaintiff relies upon the IHO's finding that T.D. made no progress during the 2002-2003 school year, arguing that as T.D. accrued no benefits during the year none could be lost. Finally, the plaintiff asserts that a determination by the Board requiring ESY for T.D., in light of the lack of IEP goals and evidence of the student's progress, would have been premature, haphazard, and speculative.

The student argues that the IHO correctly found that the Board and the ARC wrongfully refused to offer ESY services to the student in the summer of 2003. The student further argues that the IHO's determination that the ARC failed to make the appropriate multi-faceted analysis necessary to determine the propriety of ESY constituted a denial of FAPE. The student further points to the ECAB's holding that T.D. presented sufficient evidence – regression in test scores, teachers' comments, and witness testimony – to show that he needed ESY services during the summer months of 2003, while the Board failed to offer any evidence to dispute the issue. The defendants also argue that the court would

be rewarding the Board's failure to have an IEP in place in a timely manner if it accepted the plaintiff's argument and allowed the plaintiff to prevail and avoid the obligation to compensate the student for the failure to provide ESY in the summer of 2003. *Corpus Christi Ind. Sch. Dist.*, 37 I.D.E.L.R. 203 (2002). The defendants further argue that requiring the student to adhere strictly to the notion that there can be no ESY without an IEP contravenes IDEA's purpose "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. . . ." 20 U.S.C. § 1400(d)(1)(A). The nature of IDEA implies the necessity of a fact- and case-specific analysis focusing on the needs of the child rather than rote application of the statute. *See In re Zach Deal* (finding appeals board erred in determination that the sole purpose of ESY is to continue an existing IEP and that absent an IEP there is nothing to continue). The court agrees with the defendants' position and finds that the administrative determination that T.D. is entitled to compensatory education for the 2003 ESY is well supported by the evidence and the law. The court will deny the plaintiff's first claim.

Claim II:
Psychologist's Attendance and Compensation

Membership in the ARC is statutorily defined to include:

> (i) the parents of a child with a disability; (ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment); (iii) at least one special education teacher, or where appropriate, at least one special education provider of such child; (iv) a representative of the local educational agency who – (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (II) is knowledgeable about the general curriculum; and (III) is knowledgeable about the availability of resources of the local educational agency; (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi); (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate, the child with a disability.

20 U.S.C. § 1414(d)(1)(B). The statute allows but does not require the attendance of individuals with knowledge concerning the student, such as the student's private psychologist. Educational experts selected by the parents may be included in the ARC, but the Board is not required either to include the expert or to follow his recommendations. *See Dong v. Bd. of Educ.*, 197 F.3d 793 (6th Cir. 1999). The plaintiff contends that submission of a written report from

T.D.'s private psychologist would sufficiently guide the ARC. Furthermore, argues the plaintiff, ordering the Board to secure and compensate a private psychologist is an improper award of prospective relief made in the absence of any proof that an ARC consisting only of the statutorily required members would not be able to create an appropriate educational plan without assistance.

In response, the defendants first note that they believe the court should order a specific number of hours of compensatory education, rather than deferring to the determination of the ARC, obviating the need for a conclusion on the psychologist issue. The defendants argue that while a psychologist's presence is not required under the statute, the statute deals with the provision of FAPE. The IHO's order, on the other hand, deals with the provision of compensatory education. Compensatory education, as an equitable remedy for the failure to provide FAPE, can and does include requirements above and beyond those contemplated to provide a FAPE. While the administrative determination requiring that the Board compensate the psychologist for attending the ARC meeting (if compensation is required) is perhaps unusual, such an award is not unreasonable in this case. The agency reasoned that an ARC equipped with appropriate information and membership would be able to devise an individualized plan for compensatory education superior to any hour amount the agency might award without benefit of monitoring T.D.'s progress. As the administrative agency has

declined to award a particular number of hours of compensatory education, opting instead to defer to an ARC's plan for compensating the student, the court finds the requirement of the psychologist's attendance and compensation appropriate in this particular instance. Accordingly, the plaintiff's second claim will be denied.

Counterclaim I:
Amount of Compensatory Education

The plaintiff argues that an award of 2,100 hours (two full school years of instructional hours) is an extraordinary number of hours, that very few disabled children require all special education classes, and that such an award is not warranted in this case. There is no evidence in the record to indicate that such an award would be appropriate. The administrative panel has developed an extensive record of T.D.'s educational deprivation. T.D.'s parents will be allowed to attend the ARC meeting that will be held to establish the needed compensatory education services, and they can invite any experts to attend or to submit written reports to guide the ARC's determination. The court finds no reason to believe that the ECAB's award was inappropriate or that it will not compensate the student. On the contrary, as indicated in the court's discussion of the plaintiff's second claim, the ECAB's award is more innovative and likely to be more tailored to T.D.'s needs than an award of a particular number of hours predetermined without benefit of observing T.D.'s progression.

Counterclaim II:
Untimely Identification of Disability

A school board is required to identify a child with a disability within a reasonable time. *W.B. v. Matula,* 67 F.3d 484, 501 (3d Cir. 1995). "A district's duty to take steps to identify a child for IDEA special education eligibility is formulated in terms of a two-part analysis. The duty is triggered when the district has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability." *Davonne B. v. Houston I.S.D.,* No. 327-SE-596 (Texas I.H.O. Decision, May 2, 1997). A suspicion connotes a relatively low threshold. In this instance, T.D.'s teachers did react to T.D.'s problems – they noted the appropriate areas of concern in T.D.'s records and implemented interventions related to T.D.'s difficulties.

At the hearing, T.D.'s treating psychologist, Dr. Sanders, stated, "it seems fairly clear to me" that T.D. had ADHD in kindergarten. The defendants allege that the Board violated IDEA's child-find requirement and failed to notify T.D.'s parents of their rights. The child-find requirement is that the state must have in place policies and procedures that ensure that all children with disabilities who are in need of special education and related services are identified, located, and evaluated even though they are advancing from grade to grade. 34 C.F.R. Part 300, § 300.125; KAR 1:300. Failure to identify a child for IDEA eligibility could give rise to compensatory services where there has been a later determination regarding the child's

IDEA eligibility and the nature and extent of services necessary for the child to receive FAPE. Were the child found eligible and in need of IDEA services, one could state a claim for services that should have been delivered between the date on which services would have been commenced had the child been identified in a timely manner. *Texas v. Corpus Christi Ind. Sch. Dist.*, 31 I.D.E.L.R. 41 (1999). The defendants argue that T.D. was denied FAPE in the first and second grades as a result of the Board's failure to follow procedures and refer T.D. for the appropriate evaluation in a timely manner. Procedural violations causing substantive harm can cause liability to attach. *Metro. Bd. of Public Ed. v. Guest,* 193 F.3d 457 (6th Cir. 1999). The court in *Clay T. v. Walton County School District* announced the rule that "in order to establish that the school violated the identification requirements of IDEA, Plaintiff must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate." 952 F. Supp. 817 (M.D. Ga. 1997). The ECAB determined that the end of the second-grade year was the appropriate time for a referral. The school district was required to provide only a basic floor of educational opportunity under IDEA. *Rowley, supra.* Through interventions and related services, the school district did provide such a floor. It is difficult to assess whether a very young child is disabled or merely developing at a rate different from his peers, and the educational experts involved all seem to indicate that a hasty referral for special education

can be damaging to the child. T.D. has not established that the Board's alleged failure to follow child-find procedures caused substantive harm so as to have deprived T.D. a basic floor of educational opportunity.

Counterclaim III: Summer ESY 2000-2002[1]

The ECAB has already awarded compensatory education for the school years following the time when T.D. should have been identified as disabled under IDEA. A further award of compensatory education based on the Board's failure to identify T.D. as a child with a disability after T.D.'s second-grade year would be premature at this point. Furthermore, in light of the court's affirmance of the propriety of the ECAB's decision not to award a specific number of hours of compensatory education, fashioning an award of two summers of ESY would be both difficult and inappropriate. The purpose of ESY is to prevent significant regression of skills. *Cordrey, supra.* The Board has already been directed to provide T.D.'s compensatory education in a manner that will provide T.D. with the maximum benefit without becoming

[1] The student's claim to entitlement to compensation for missing ESY for the summer of 2000, based on T.D.'s assertion that he should have been identified as qualified under IDEA for the school year preceding that summer, is overruled in light of the court's determination that the Board did not deny FAPE by failing to refer T.D. for evaluation prior to his second grade year (2000-2001 school year).

punitive. The court construes this directive as ensuring that T.D. does not significantly regress.

Counterclaim IV:
Least Restrictive Environment ("LRE")

The defendants want T.D. to be placed in a collaborative learning environment: a regular classroom with a teacher of exceptional children providing specially designed instruction. Furthermore, the defendants claim that T.D. will suffer low self-esteem and will therefore be psychologically harmed by removal from the classroom.

A child must be educated in the LRE that will provide a meaningful educational benefit. *Oberti v. Bd. of Educ.,* 995 F.2d 1204 (3d Cir. 1993). LRE requires mainstreaming the child as much as possible while maintaining satisfactory education. 20 U.S.C. § 1412(a)(5)(A); *S.H. v. Sch. Dist.,* 336 F.3d 260 (3d Cir. 2003). The ECAB determined that T.D. cannot be successful in a regular classroom all day and therefore must be taught in the resource room for one-half hour each day. T.D. argues that the evidence upon which the ECAB based its decision was collected prior to the IEP, resulting in the use of an inappropriate baseline, and that witness testimony establishes that T.D. can be successful in a regular classroom.

The plaintiff points out that T.D. will be outside the regular classroom for only thirty minutes per day to receive intensive reading instruction. The school psychologist found that T.D. requires few distractions

to have successful one-on-one work. The IHO found this testimony more credible than that of T.D.'s private psychologist, who has never seen T.D. in a classroom setting. Furthermore, T.D.'s parents requested that T.D. receive occupational therapy outside the regular classroom, mitigating the level of concern for T.D.'s self-esteem.

The regular classroom may not be appropriate to achieve benefits to the child. The court, having never met T.D. and without benefit of expertise on the student's self-esteem and level of ability to ignore distractions, will defer to the reasoned explanations and opinions of those who have observed the child. The preponderance of the evidence supports the propriety of allowing the Board to teach T.D. outside the classroom for short thirty-minute intervals in order to achieve satisfactory education.

Counterclaim V:
Omission of Math Goal from IEP

The student argues that his records reflect a clear deficiency in math. The IHO determined that T.D.'s difficulties in math stemmed from his ADHD and that improving T.D.'s reading and language comprehension skills will improve his math. The court will not second-guess education experts, and T.D. has not shown any reason that the court should do so.

Counterclaims VI, VII, VIII:
Behavioral Strategies

An IEP must be reasonably calculated to enable the child to receive educational benefits. *Tucker v. Calloway Co. Bd. of Educ.,* 136 F.3d 495, 503 (6th Cir. 1998). The burden is on the party challenging the terms of an IEP to show that it is inadequate. *See Cordrey,* 917 F.2d at 1469.

L.M. has proposed a behavioral strategy that he claims should have been adopted. The plaintiff counters that the BIP is an issue of methodology, and parents of disabled children are not entitled to require that a specific methodology be used. *Renner v. Bd. of Educ.,* 185 F.3d 635, 645 (6th Cir. 1999). Mere disputes over methodology are not actionable. *Rettig v. Kent Sch. Dist.,* 720 F.2d 463 (6th Cir. 1983). Furthermore, there are no statutory requirements for a BIP, making it impossible to evaluate whether it is substantively invalid. *Alex R. v. Forrestville Valley Sch.,* 375 F.3d 603, 614-15 (7th Cir. 2004).

The defendants claim that T.D.'s parents were denied meaningful participation in planning behavioral strategies at an ARC meeting. T.D.'s parents were included in the ARC meetings and were provided the opportunity to express their views. They were given copies of the BIP and were allowed to comment. The BIP was developed outside formal ARC meetings, but T.D.'s parents were invited to attend. They chose to decline. The necessity of parental participation in T.D.'s educational plan does not

preclude discussions about the student's education outside formal ARC meetings. *See Burilovich,* 208 F.3d at 568. While parental participation is a key element of IDEA, the defendants have not shown that the Board failed to allow their participation.

Counterclaim IX: "Child Find" Procedures

The topic of "child find" procedures is inappropriate for the court's review, which is limited to whether T.D. should have been referred earlier than the end of the student's second-grade year. The court has resolved this query pursuant to the defendants' second counterclaim and need not address it further.

Counterclaims X and XI: Inadequacy of Behavioral Goals and Dates

The issues before the IHO were (1) whether the Board failed to appropriately identify, initiate a referral, and evaluate T.D. under IDEA's child find requirements; (2) whether the Board failed to provide ESY services during the summers between 1999 and 2003; (3) whether the Board failed to develop an appropriate IEP in 2003; and (4) whether the Board properly developed the BIP. The ECAB reviewed these eight issues: (1) whether an award of 125 hours of compensatory education was sufficient; (2) whether the Board had child find policies in place; (3) whether T.D. was referred for evaluation in a timely manner; (4) whether T.D. was denied FAPE during his second

grade year; (5) whether T.D.'s IEP should have included a math goal; (6) whether T.D.'s BIP should have been developed within the IEP process and included therein; (7) whether T.D. should have received ESY for the summers of 2001 and 2002; and (8) whether T.D. received placement in the LRE.

The district court is to review the issues that were presented to the state agency. *See Rowley, supra; Alamo Heights Ind. Sch. Dist. v. Bd. of Educ.*, 790 F.2d 1153, 1159 (5th Cir. 1986). The defendants state that the issues of clarity of behavioral goals and duration of remediation were before the agency, but that the agency improperly failed to address the issues. To the extent that this assertion is true, the court will address the counterclaims. First, the nature of behavioral strategies implies reactive methodology. That is, merely hypothetical methods may be used, in anticipation of student behavior. The goals and objectives for T.D.'s behavior must be broad enough to allow each teacher to implement them in his or her own classroom setting. In light of the nature of the strategies, the court finds that they are appropriate.

An IEP must include a proposed starting date and anticipated duration. 20 U.S.C. § 1401(19). However, a remedy exists for the failure to adhere to this procedural violation only if it results in substantive harm. *Knable v. Bexley Sch. Dist.*, 238 F.3d 755 (6th Cir. 2001). As the defendants failed to allege any substantive harm and the court detects none, the claim will be denied. Accordingly,

IT IS ORDERED that the determinations made by the ECAB are **AFFIRMED**, and the parties' claims and counterclaims are **DENIED** for the reasons stated in the foregoing opinion.

Signed on March 6, 2006

/s/ Jennifer B. Coffman
JENNIFER B. COFFMAN, JUDGE
U.S. DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

[SEAL]

KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN
SERVICES AGENCY CASE NO. 0203-22

TD **PETITIONER**
Represented by
Hon. Marie Allison

VS.

FAYETTE COUNTY PUBLIC SCHOOLS **RESPONDENT**
Represented by
Hon. Robert Chenoweth

* * *

EXCEPTIONAL CHILDREN'S APPEAL BOARD

FINAL DECISION AND ORDER

* * *

CHAIRMAN
Clinton D. Kirk

DECISION RENDERED:
May 15, 2004

PROCEDURAL HISTORY

On March 1, 2004 the Kentucky Department of Education, Division of Exceptional Children Services (hereinafter "KDE"), received a Notification of Appeal from Hon. Robert Chenoweth, counsel for Fayette County Public Schools (hereinafter "District"), in Agency Case No. 0203-22, [TD] v. Fayette County Public Schools. On March 2, 2004 KDE received

Notification of Appeal and an Appeals Brief from Hon. Marie Allison, counsel for [TD] (hereinafter "student"), also in the above styled case. KDE, by letter formed an Exceptional Children Appeal Board (hereinafter "ECAB") on March 3, 2004 to review the Hearing Officer's Decision and Order and render a decision. The original ECAB was composed of Hon. Milton C. Toby, Hon. Kathy G. Reutman, and Clinton D. Kirk, Chairman.

Hon. Milton Toby, by letter dated March 11, 2004, disqualified himself from service on the panel due to a potential conflict. On March 12, 2004 a telephonic conference was conducted between the Chairman of the ECAB and both parties represented by counsel. During the conference, Ms. Allison indicated her intent to request that another member of the ECAB be recused. By letter dated March 16, 2004, the student filed the request. Both parties requested an extension to the deadline for the ECAB Final Decision and Order. Counsel for the District needed time to prepare a brief in response to the student's appeal and a cross appeal and counsel for the student requested adequate time to respond to the district combined brief. No change in the deadline for the ECAB Final Decision and Order was discussed at this time due to the vacancy and potential vacancy on the panel.

The Chairman of the ECAB issued an Agreed Order on March 15, 2004 establishing March 29, 2004 as the deadline for submission of the District's response and cross appeals brief. The order also established

April 19, 2004 as the deadline for submission of the student's brief in response to the District's response and cross appeal.

In a letter received March 20, 2004, Hon. Kathy G. Reutman Bryant disqualified herself from service on the ECAB due to a potential conflict. Hon. Anthony Bracke and Hon. Zaring Robertson were subsequently appointed by KDE to fill the vacancies on the ECAB. On March 22, 2004, a second telephonic conference was conducted by the Chairman of the ECAB, to discuss the date for the ECAB Final Decision and Order in light of replacement of two of the ECAB members. Both parties, represented by counsel, requested that the panel be allowed adequate time to review all evidence, transcripts, and post-hearing briefs. The Chairman of the ECAB entered a Second Agreed Order on March 23, 2004 establishing May 15, 2004 as the deadline for service of the ECAB Final Decision and Order in the above styled case.

On March 26, 2004 counsel for the student filed a motion requesting opportunity to present additional oral arguments before the ECAB. After review and being sufficiently advised by members of the ECAB, the Chairman entered an Order on April 3, 2004 denying the student's motion.

The ECAB received the District's Combined Brief in Support of School District's Appeal and Response to Student's Appeal memorandum served March 29, 2004. The panel received the student's Response to Fayette County School District's Combined Brief by

service dated April 19, 2004. The ECAB Final Decision and Order was rendered and served to both parties and KDE on May 15, 2004.

Discussion of Issues

A. Did the Hearing Officer err in determining that the student was denied a free appropriate public education for two years due to the District's failure to refer and evaluate the student?

The student contends that the Hearing Officer erred in concluding he was denied a free appropriate public education only after the 2001 school year. Underlying this argument is the question of whether the District's "Child Find" efforts were adequate. The ECAB affirms the Hearing Officer on these points.

It was the student's burden to prove that the District should have identified him as eligible for services under the IDEA during his first two years in ungraded primary school. The evidence of record is uncontradicted that the District (and the individual school in question) had referral procedures in place, and provided training to appropriate school personnel in identifying students with potential needs under IDEA. Specifically, there is substantial evidence in the record to support the Hearing Officer's finding the student's teachers, "knew they had an obligation to refer if they suspected a child had a disability, they knew there was a referral process in the school, and they knew the appropriate persons to contact within

the school to assist them with referrals." Thus the ECAB must reject the student's broad contention that the District is guilty of a "systemic" failure to implement the IDEA's Child Find requirements.

The student also advances a more specific argument that the District failed to properly identify him his first two years as potentially eligible for services. The argument relies heavily on general guidelines for identifying ADHD, as available in publications and on the Internet. The Hearing Officer, however, correctly relied upon facts and expert testimony particular to this case. Factually, she observed that the student's initial Kindergarten report card only noted concern over behavior/social skills and some academic areas, but documented adequate academic progress by the end of the year. As to whether these concerns should have triggered an IDEA evaluation, the Hearing Officer cited testimony that the nature of ungraded primary school recognizes the progress of very young students is not uniform. Dr. Mintyre testified the student's indicators in Kindergarten should not have caused teachers to "jump to conclusions". In first grade, the student fell behind in reading. However, the evidence establishes that the District intervened, and the results were positive. The student was only thought to be "immature".

The ECAB finds the Hearing Officer's findings and conclusions to be correct. With the benefit of hindsight, the student now correlates the concerns documented in his first two years of school as signs of ADHD. There is nothing to establish, however, that

those problems were – at the time – outside of the realm of expected variance among primary students.

B. Did the Hearing Officer err in determining that the student was denied a free appropriate public education due to the District's failure to provide Extended School Year services for the summer months of 2003?

The Hearing Officer determined that the District should have evaluated the student for extended school year (hereinafter "ESY") services beginning with the summer following the 2000-2001 academic year. No such evaluation occurred for that year or the following year. However, the student did receive extended school services (hereinafter "ESS") during those summers. The Hearing Officer concluded that these technical violations at the conclusion of the 2000-2001 and 2001-2002 school years did not merit an award of compensatory education because the student failed to demonstrate that the ESS services provided during each summer were insufficient to address the student's needs. It was the student's burden to prove that an actual loss of educational opportunity occurred as the result of the District's failure to consider ESY for those years. Since that burden went unfulfilled, the Hearing Officer did not order a remedy for those violations.

The Hearing Officer reached a different conclusion regarding the summer following the 2002-2003 academic year. She reviewed the ARC discussions

regarding the issue and determined that the District failed to conduct an appropriate multi-factored analysis of this issue for the student at the conclusion of that year. This violation did result in the loss of an educational opportunity for the student since he did not receive services under ESS or ESY for that summer. Accordingly, the Hearing Officer awarded compensatory education equal to the number of hours equal to the ESY services that the student would have received during the summer months of 2003.

This issue was appealed by both parties. The student is seeking an expansion of the compensatory education award to cover each of the summer breaks at the conclusion of the school years from 1999 through 2003. The District argues that no compensatory education award should have been given on this issue since the ARC properly concluded that the student was not eligible for ESY services during the summer months of 2003. After careful consideration of the material offered by each appeal, we are inclined to agree with the Hearing Officer on this issue. While the District committed technical violations by failing to properly evaluate the need for ESY services for three summers (2001 through 2003), only the 2003 violation resulted in a proven loss of educational opportunity.

As discussed in the analysis of the previous issue, the District did not have an obligation to evaluate the student for special education services, including ESY, until the end of the 2000-2001 academic year. This means that no ESY violation could have occurred

during the summers of 1999 or 2000 since the student had not been identified as being eligible for special education services during that time.

It is undisputed that no consideration of ESY services for the student occurred prior to the summer breaks of 2001 and 2002. This was a violation of the student's rights under IDEA since we have concluded that the District should have conducted a referral and begun providing special education services to the student by the end of the 2000-2001 school year. However, the Hearing Officer correctly pointed out that not every procedural violation amounts to a failure to provide a free appropriate public education.

Case law indicates that only those procedural violations that result in the loss of educational opportunity or which seriously infringe upon a parent's opportunity to participate in the proper process necessary to complete an IEP will constitute a denial of a free and appropriate public education that entitles the student to relief. *See Knable v. Bexley City School District,* 238 F.3d 755, 765-766 (6th Cir. 2001); *Renner v. Bd. Of Education,* 185 F.3d 635, 642 (6th Cir. 1999); *Babb v. Knox County Sch. Sys.,* 965 F.2d 104, 109 (6th Cir. 1992); *W.G. v. Board of Trustees of Target Range School District,* 960 F.2d 734 (2nd Cir. 1994).

It is the student's burden to demonstrate that the procedural violations caused this loss of educational opportunity. *Doe v. Bd. Of Educ. Of Tullahoma City Schools,* 9 F.3d 455, 458 (6th Cir. 1993). *Doe* is not

precisely on point since it deals with the burden to prove the inadequacy of an IEP. However, its logic is applicable to this situation. The student is the one seeking a remedy in this matter. It is only appropriate for the party seeking a remedy to prove a substantial loss.

As the Hearing Officer noted, there was significant evidence in the record demonstrating that services were provided through the ESS Program to the student during the summer months of 2001 and 2002. These services were focused on student deficiencies needing additional work. The student failed to show that these services were inappropriate or insufficient to meet his needs during those summers. Accordingly, the Hearing Officer correctly denied relief for those summers.

The remaining time in question under this issue is the summer break of 2003. Unlike the previous summers, the District did a nominal ESY evaluation prior to this summer. But the analysis used by the District was significantly flawed according to applicable laws, regulations, and its own procedures. This resulted in another procedural violation by the District in this area.

The District's own procedures required the ARC to look at more than a single criterion in determining the need for ESY. They also noted that tests and observation data, as well as opinions of professionals, should be utilized to make a determination of the need for ESY services in cases where insufficient data

existed regarding recoupment after breaks in instruction. Clearly, these procedures provided for the possibility of a need for ESY services even when the District had been unable to obtain recoupment data prior to the ESY evaluation.

This analysis is consistent with the Sixth Circuit's position on the subject. *Cordrey v. Euckert,* 917 F.2d 1460, 1473-1474 (6th Cir. 1990), held that ESY was appropriate to prevent significant regression of skills or knowledge that would seriously affect the student's progress. The Court emphasized that students were not required to produce empirical proof of actual prior regression and that expert opinion on the subject could be sufficient to prove the need for ESY. *Id.* at 1471-1472.

The Hearing Officer carefully applied this standard to the District's analysis of the ESY issue during the May 14, 2003 ARC meeting. The evidence of that meeting made it clear that District failed to conduct any individualized analysis as to the student's possible need for ESY. Instead, the District merely stated that no IEP had been implemented for the student and that this fact precluded him from receiving ESY. This failure to individually analyze the issue was a clear violation of the obligations imposed on the District by IDEA.

The next question is whether or not this violation caused a loss of educational opportunity for the student. As the Hearing Officer found, the record demonstrated that the student was not offered ESS

services during the summer months of 2003. Therefore, unlike the prior two summers, there were no efforts by the District over that summer that may have alleviated the harm caused by the failure to consider and provide ESY to the student. As a result, the student is entitled to compensatory education relief for that missed ESY program if sufficient evidence in the record demonstrates that he would have received ESY services if the District had conducted a proper analysis of the issue at the end of the 2002-2003 school year.

Again, the Hearing Officer correctly followed the weight of the evidence regarding this question. The student offered sufficient evidence to demonstrate that he needed ESY services during the summer months of 2003. This evidence included regression in test scores, comments made by the student's teachers, and other testimony offered by witnesses in the Hearing. The District failed to offer any significant evidence to dispute the issue. Even though the student's evidence was not overwhelming regarding this issue, it was sufficient to overcome the absence of proof to the contrary. The portion of the Hearing Officer's Decision and Order awarding compensatory education to the student for the missed ESY opportunity during the summer break of 2003 is affirmed. A specific discussion of the nature of the compensatory education to be provided is in section E of this Discussion of Issues.

C. Did the Hearing Officer err in determining that the District acted appropriately in developing the Behavioral Intervention Plan (hereinafter "BIP") for the student?

The ECAB somewhat agrees with the District in characterizing the student's argument relative to the Behavioral Intervention Plan (hereinafter "BIP") as convoluted. The parent of the student admitted that he was invited to attend the team meetings scheduled to develop the BIP, and that he was never denied the opportunity to participate. Yet, counsel now contends the parent was "shut out" by the District and "NEVER" allowed to discuss certain behavioral strategies! Counsel also references circumstances involving other students, which this ECAB considers inappropriate. In one paragraph, the student requests only an opportunity to discuss behavioral strategies at an ARC; but in the next paragraph he demands "the right to have any and all behavioral interventions that the school plans to implement presented to the parent at an ARC meeting with the opportunity for the parent to review, discuss and suggest modifications or deletions."

We cannot improve upon the Hearing Officer's thorough analysis of this issue, As analyzed by her, the IDEA does not require a BIP to be *developed* in an ARC meeting. It is the role of the ARC to *determine* that a BIP is necessary. Contrary to the student's argument, however, the details of the BIP itself are

the behavioral equivalent to teaching "methodology" – left, to a great degree, to the discretion of the District. As cogently pointed out in the decision below, teachers must be instantly free to adapt behavioral strategies according to their effectiveness.

The student also complains, for example, that the ARC should have established "what would happen once the student went to the Principal's office." That is an impossibility, and highlights the observation by the Hearing Officer that a BIP must be fluid. The members of an ARC cannot predict, in advance, what the appropriate behavioral strategy should be when a student is sent to the Principal's office. That strategy can only be determined in the context of why the student happened to be sent.

The ECAB can express general agreement with the proposition by the student that he should be allowed meaningful participation in establishing a BIP. We affirm the Hearing Officer, however, that the student was indeed offered an opportunity to participate. We further agree that it is not required that the particular details of a BIP be developed by the ARC.

D. Did the Hearing Officer err in determining that the District developed an appropriate IEP for the student?

Some part of this argument has been addressed above as to whether a specific BIP is a required part of a student's IEP, to be developed by the ARC. In addition, the student argues that his IEP should

include a math goal. He further contends his placement in the resource room for reading and writing instruction violates the least restrictive environment (hereinafter "LRE") requirement of the IDEA.

With regard to math, the ECAB has reviewed the record, and, like the Hearing Officer, identified no expert testimony establishing the student was truly deficient in math itself. Rather, the weight of the evidence supports the conclusion that any difficulties exhibited by him in that area were the result of his *reading* disability. Even if, as argued by the student, his poor math performance is a manifestation of ADHD, this still does not establish the need for a math goal, as such, in his IEP. Rather, the ECAB concludes that addressing the reading disability (and/or ADHD) in the IEP would resolve the incidental problem.

The student relies heavily on the desire of his parent to include a math goal in the IEP, and contends that to ignore his wishes makes him a less-than-equal participant in IEP development. The ECAB observes that "equal" participation is inconsistent with imposing unilateral desires. The ARC is a committee, which, by design, is not ruled by a single individual or minority faction. Further, the argument sidesteps the real issue, which is whether the evidence of record supports the Hearing Officer's decision. In weighing conflicting arguments, the Hearing Officer properly considered not only the quantity of evidence related to the need for a math goal, but also the credentials of the witnesses involved.

The ECAB's explanation about affirming the Hearing Officer based on the weight of evidence also applies to the LRE issue. Again, it was the parent alone who desired that one-on-one reading instruction be provided in the regular classroom rather than a resource room. Yet, a special education teacher, the school psychologist and Ms. Swigert all indicated a resource room offered less distraction and more potential instructional benefit. The unilateral desire of the parent in no way outweighs such testimony.

The parent's opposition to placement in a resource room for reading instruction was based on concern, supported by expert testimony, that the student would have lower self-esteem from being pulled out of the regular classroom. Aside from the Hearing Officer's observation about inconsistent concern – since the student was removed from the regular classroom for other therapies – she weighed the expert testimony offered by the student, and found it lacking in comparison to the conflicting testimony from the school psychologist. She explained this was based on the fact that the student's expert had never observed him in the school environment. Also, it is clear that the Hearing Officer correctly balanced the self-esteem concern against the relative benefit expected from the more restrictive placement. Therefore, the ECAB affirms the determination of the Hearing Officer that providing intensive reading instruction to the student outside of the regular classroom was appropriate.

E. Did the hearing Officer establish appropriate remedies for the student as a result of the violations?

The Hearing Officer made two significant conclusions that affect the remedies to be awarded to the student. The first is that the District committed a significant violation of IDEA by failing to correctly find and evaluate the student for eligibility for special education services. This violation caused a two-year denial of appropriate special educational services to the student. There was a clear denial of educational opportunity for the student for this two-year period. The second conclusion was that an additional denial of appropriate special educational services and loss of educational opportunity occurred when the District failed to provide ESY to the student during the summer months of 2003. We have affirmed each of these conclusions.

The resulting issue concerns the remedies to be awarded to the student as a result of these conclusions. The Hearing Officer's Decision and Order awarded one hundred twenty-five (125) hours of compensatory education in the form of one-on-one instruction in reading skills and language skills to remedy the two-year denial of a free appropriate public education caused by the delay in identifying the student as eligible for special education services. The Decision and Order also awarded an additional number of hours of compensatory education equal to the number of hours of ESY instruction that the

student should have received during the summer break of 2003. All other forms of requested relief were denied, Both sides have appealed the award of compensatory education outlined by the Hearing Officer's Decision and Order.

Counsel for the student argues that the Decision and Order provides for an insufficient amount of compensatory instructional time to provide the student with adequate relief for the two-year delay in providing services to the student. They suggest that the period of compensatory education for this violation should be 2100 hours. This is the hourly equivalent of two years of instructional time. Counsel for the student also continues to assert that the Hearing Officer should have required the District to reimburse the student's family for counseling services privately provided to the student in the past and to continue to pay for these counseling services until the student is released from treatment.

Counsel for the District concedes that an award of compensatory education should be given for the two-year delay in identifying and providing special education services to the student. However, the District appeals two aspects of the compensatory education award provided in the Hearing Officer's Decision and Order. Their first claim regarding this issue is that the Hearing Officer erred in specifying a particular amount of instructional services to be provided to the student as part of the award of compensatory education. The District argues that the details of the compensatory education award should

be set by the student's ARC, not the Hearing Officer. The second claim is that the Hearing Officer erred in requiring the District to invite the student's treating psychologist to the ARC meeting establishing the timing of the provision of compensatory education to the student, and to pay a reasonable fee to that psychologist for his attendance, if necessary.

After reviewing all of the material concerning this issue, we find that each party is entitled to a partial degree of success regarding the issue of remedies. However, each party has also raised an appellate claim that is not supported by the law or the facts. We will address those claims initially.

The student's claim for reimbursement and payment of private counseling expenses is simply unsupported by any form of a legal foundation. Counsel for the student fails to offer a single statute, regulation, or case that would allow the Hearing Officer to award this form of monetary damages. We suspect that is the necessary consequence of the fact that no such authority exists. The general rule is that monetary damages may not be awarded within the context of a Due Process Hearing. *See Hall v. Vance Cty. Bd. Of Educ.*, 774 F.2d 629 (4th Cir. 1985). Accordingly, the Hearing Officer's refusal to award reimbursement for private counseling or payment of future counseling expenses is affirmed.

A similar result is required when we consider the District's appeal of the portion of the Hearing Officer's Decision requiring the District to invite the

student's treating psychologist to the ARC meeting addressing compensatory education for the student, and requiring the District to pay a reasonable fee to that psychologist if such payment is necessary to procure his attendance. This portion of the Decision and Order was an appropriate extension of the Hearing Officer's equitable authority to address the District's violations and must be affirmed.

It is important to remember that the Hearing Officer's Decision and Order is very specific and limited on this point. The District is only required to invite and pay for the psychologist to attend a single ARC meeting addressing a single issue, the amount of additional time that the student can tolerate to receive benefit from the compensatory education services without those services becoming punitive in nature. The psychologist certainly has valuable input to offer on that issue. That input can certainly be received in a single ARC meeting. There can be little doubt that the give-and-take allowed by such a personal appearance would be preferable to having the psychologist prepare a report on the subject without any assistance from the other ARC participants.

Counsel for the District's argument implies that the Hearing Officer's Order permanently changed the ARC membership for the student. That is not the case. The Hearing Officer did not impose any membership requirements on the ARC for any meeting other than the single one specified in her Decision and Order. This ARC meeting in question is limited to a specific purpose and need not go beyond that purpose. This

purpose is to address a specific part of the compensatory education services awarded to the student.

It is important to remember that compensatory education is not the same thing as a free and appropriate public education. It is an equitable remedy of extra services awarded to the student as a result of serious legal violations committed by a school district. As such, there may be very different rules for an award of compensatory education than those that exist for the normal functions of an ARC. Little case law exists regarding the specific nature of compensatory education or the limits on the authority of a Hearing Officer regarding the details of such a remedy. The cases that do exist focus on the equitable nature of the remedy and the general power of the Hearing Officer to address the wrongs committed by the school district. Counsel for this district has failed to offer any authority which would preclude a Hearing Officer from ordering the District to pay for the services of outside individuals in formulating the details of an award of compensatory education. Compensatory education is not a normal ARC function and decisions regarding it are subject to different rules than those covering general ARC matters.

The District's emphasis on 20 U.S.C. Section 1414(d)(1)(B) is misplaced. First of all, there is no language anywhere in IDEA limiting the membership of ARC meetings addressing compensatory education issues. Secondly, that cited section of IDEA specifies that the student's IEP team ***must*** include other individuals with special knowledge or expertise

regarding the child when such individuals are invited by either the student's family or the District. This supports the position that such an individual is just as important a member of the IEP team, when invited, as anyone else. 34 C.F.R. 300.344(a) requires the District to ensure that the student's IEP team includes all required members. These required members include "other individuals who have knowledge or special expertise regarding the child" when such members are invited at the discretion of the parent or the District. 34 C.F.R. 300.344(a)(6). No district could escape this requirement of having the necessary members present by inviting those participants and failing to make the necessary financial arrangements to have them attend. If a participant is a necessary member, then the District has the obligation to ensure the attendance of that member.

Here, the parents certainly have the discretion to invite the psychologist to attend the ARC meeting addressing compensatory education since, as the Hearing Officer decided, that psychologist has special insight into the student's tolerance for extra work. Since the psychologist is a necessary participant for that purpose, the District has the obligation to ensure his attendance at that meeting. This includes paying a reasonable fee to the psychologist if he requires it.

The District cites to two Sixth Circuit cases regarding this issue, *Kings Local School District v. Zelazny,* 325 F.3d 724 (6th Cir. 2003) and *Dong v. Board of Educ. of Rochester Community Sch.,* 197 F.3d 793 (6th Cir. 1999). A close review of those cases

reveals that they are distinguishable from our circumstances. The most obvious distinction is that the Hearing Officer action in question here is part of an award of compensatory education. It is not an ongoing requirement changing the normal obligations of a school district. Even if the District is not normally obligated to ensure the participation of outside experts, as suggested in these decisions, it certainly may have the obligation to utilize them as part of an equitable remedy of compensatory education. Also, it should be noted that the portions of these decisions on point are dicta and are not crucial to the central holding of either case. The Hearing Officer's ruling is based on specific proof of the need for the attendance of the psychologist that may not have been present in *Zelazny* or *Dong*.

We do not address the issue as to whether or not the District would have the obligation to ensure the psychologist's attendance of any other meetings of the ARC. The Hearing Officer's Decision and Order only required this of a single meeting. Our affirmation of that portion of the Decision does not go beyond the language phrased in the Hearing Officer's Decision and Order. Any future disputes about ARC membership will have to be resolved at the time that they arise. However, the portion of the Hearing Officer's Decision and Order requiring the District to invite the private treating psychologist to the ARC meeting addressing the amount of time the student will be able to tolerate receiving compensatory education services and to pay for that attendance is affirmed.

Finally, we have to address the appeals brought by each party regarding the Hearing Officer's specific designation of a number of hours of compensatory education to be provided to the student. Here, we begin with an analysis of the existing law regarding compensatory education.

20 U.S.C. Section 1415(3)(2) clearly allows a hearing officer or a court to award compensatory education for a violation of the IDEA. Every federal circuit addressing the issue has held that an award of compensatory education is appropriate if a student is denied educational services that should have been provided when this deprivation caused a loss of educational opportunity. *See Pihl v. Massachusetts Dep't of Education*, 9 F.3d 184 (1st Cir. 1993); *Mrs. C. v. Wheaton*, 916 F.2d 69 (2d Cir. 1990); *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Meiner v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986); *Jefferson County Board of Education v. Breen*, 853 F.2d 853 (11th Cir. 1988). The Sixth Circuit of the United States Court of Appeals has authorized the awarding of compensatory education through its reasoning in *Thomas v. Cincinnati Board of Education*, 918 F.2d 618 (6th Cir. 1990) and *Hall v. Knott County Board of Education*, 941 F.2d 402, 407 (6th Cir. 1991).

Many courts specifically addressing the issue have held that the amount of compensatory education to be awarded is the duration of time that the appropriate education was denied. M. Weber, Special Education Law and Litigation Treatise 22.3(6) (2nd ed. 2002). However, indications exist that circumstances may

occur when it may take ***more*** than equal time to compensate for previous educational deprivations. *Id. citing Strawn v. Missouri State Bd. of Educ.,* 210 F.3d 954 (8th Cir. 2000). As the Hearing Officer pointed out, the Ninth Circuit has adopted an approach that looks to the specific needs of the student and could well result in an award of less compensatory education time than the duration of the educational deprivation. *See Parents of Student W v. Puyallup School District,* 31 F.3d 1489 (9th Cir. 1994). As of yet, the Sixth Circuit has failed to provide specific guidance as to its position on the issue.

Both sides have appealed the portion of the Hearing Officer's Decision specifically awarding "one hundred twenty-five hours of one-on-one instruction in reading skills and language skill consistent with the recommendations from Dr. McIntyre and Ms. Swigert, and the LEA's Integrated Report." The student argues for an expansion of this award. The District argues that the specific designation of a number of hours of a particular form of instruction should be removed and that the ARC should determine the nature of the compensatory education award. Both sides offer persuasive reasoning, but lack actual case authority since this area has not been sufficiently litigated for good case law guidance. However, both arguments have merit regarding certain issues.

We agree with counsel for the student that the Hearing Officer should have awarded two years of compensatory education as a remedy for the two-year

delay in identifying and providing appropriate special education services. This procedural violation caused a two-year loss of educational opportunity that has affected the student in all of his subjects. The provision of one-hundred twenty-five (125) hours of one-on-one reading instruction may not be sufficient to address two-years of missed special education services. It is absolutely true that the record indicates that many of the student's education problems are directly related to his reading difficulty. Addressing this particular problem may result in benefit in all subject areas. However, the award of compensatory education, like a free appropriate public education, must address all areas of the student's identified disabilities. This means that the award may well need to go beyond a specific number of hours of reading assistance.

However, we decline to award the requested 2100 hours of compensatory education for this violation for the reasons specified in the appellate arguments of the District. It is simply premature at this time to guess at the number of hours of extra services that will be necessary to compensate the student for the two-year delay caused by the District's violations. 125 hours may not be enough; 2100 hours may be too many. Everyone involved with the student certainly hopes that he will be able to recover quickly from his past educational deprivations. However, it is too soon to know.

Rather than specifying a number of hours of compensatory education to be awarded at this time, it

would be better to specify the amount of time that a denial of a free appropriate public education occurred that resulted in a loss of educational opportunity and to require the District to provide compensatory education services sufficient to remedy that loss. Here, the appropriate time amounts to two years plus an additional award of time for the missing ESY program from the summer of 2003. The specific number of hours of extra services needed to provide a fair remedy for that loss should be determined by the student's ARC. If the ARC is unable to resolve that issue, both parties have the option of calling for a subsequent Due Process Hearing to focus specifically on the length and details of a compensatory education plan.

The total number of hours of compensatory education services to be awarded to the student is less important than the amount of extra services that he will receive in a specific week, or over school breaks and the form of such services. Given the absence of data on how the student progresses when appropriately served, we urge the ARC to initially focus on a plan for the delivery of such services rather than setting an outside limit on the total services to be received. Once an appropriate plan is prepared for delivering the services, the ARC can then periodically meet to review the student's progress and see how much need still remains for compensatory education. That seems to be a more practical approach to the problem than for the Hearing Officer (or this Appeals

Panel) to try to guess now what will be needed in the future.

That same logic applies to the type of services to be provided through the compensatory education plan. Counsel for the student argues that the student's family should be able to dictate the timing and form of compensatory education services since the District has demonstrably failed to fulfill its required duties relating to the student. Counsel for the District argues that the specific nature of a compensatory education award is a methodology question that must be left to the sole discretion of the District. We feel that both positions are too extreme. Neither party should have total control over the compensatory education program for the student. We look to the collaborative efforts of each ARC meeting across the country for inspiration and for an appropriate remedy.

ARC meetings routinely enable school districts and families of students to work together to make fundamentally important decisions regarding the special education program for each student. It is true, as counsel for the student asserts, that compensatory education is not a topic assigned to the ARC by statute or regulation. However, that entity is the one best equipped to attempt to decide issues related to that topic. Again, as previously noted, both sides will have the right to call for a subsequent Due Process Hearing in the event that the ARC cannot reach consensus regarding any aspect of the compensatory education program.

We admire the Hearing Officer's effort to give as specific a remedy as possible. The ARC can adopt her specific award of 125 hours of one-on-one reading instruction as a cornerstone of the compensatory education program if, in its discretion, it agrees with her analysis of the student's needs. Also, the history between the parties has been contentious and may well, unfortunately, remain contentious. A very real possibility exists that the ARC may not reach consensus on important compensatory education issues. However, the existence of the past does not always dictate the outcome of the future. It was enough for the Hearing Officer to determine the length of time when the student was deprived of educational opportunities due to violations of the District and to award compensatory education for those violations. The details of the compensatory education award are best left to the ARC, when possible.

It is important to remember that the ARC is no more a tool of the District than it is of the student. It is designed to be an independent entity, beyond the direct control of either party. Therefore, assigning this responsibility to the ARC does not minimize the input of the student's family; nor does it allow the District to dictate the remedy for its past violations.

It is equally important to understand that we are not placing any portion of the compensatory education plan under the exclusive control of the District. While many areas of the provision of a free appropriate public education – such as teaching methodology and personnel issues – are normally left to the discretion of

the District, compensatory education is not such an issue. No award of compensatory education would be needed if the District had met its responsibilities with regard to this student. Accordingly, there is nothing inappropriate about calling upon the ARC, and not the District, to map out the details of the compensatory education award. If the ARC decides that the compensatory education award requires the provision of a specific amount of a specific type of services, then it will be the duty of the District to provide them as specified by the ARC.

Again, compensatory education is an equitable remedy that is far different from the ordinary requirement to provide a free appropriate public education. It consists of services that go ***above and beyond*** the District's ongoing obligation to provide whatever services the student needs to receive a free appropriate public education. We believe that the ARC has authority, by virtue of the equitable nature of the remedy, to order specific details of a compensatory education program that go beyond the normal limits of an ARC's jurisdiction.

Decision and Order

Based on all of the foregoing, the Decision of the Hearing Officer is AFFIRMED in all aspects except for the following matters concerning the remedies for the student:

1. The District shall convene a meeting of the ARC for the student within seven days of the effective

date of this appellate Decision and Order to address the matters contained herein.

2. The student is awarded compensatory education as follows:

> A. Two years of compensatory education for the District's delay in identifying and providing special education services to the student.
>
> B. An additional award of compensatory education for the ESY program that the student should have received during the summer of 2003.

3. The compensatory education services awarded to the student shall consist of services beyond those required to provide a free appropriate public education to the student so long as he qualifies for special education services. As such, they may be offered to the student in the form of tutoring before school hours and/or after school hours as well as services offered to the student during school breaks.

4. The compensatory education services should be offered in a manner designed to enable the student to receive maximum benefit without the services becoming aversive or punitive to the student.

5. The District shall invite the student's treating psychologist to a single ARC meeting to enable him to offer direct input during that meeting regarding the amount of extra services that the student will be able to tolerate and to serve as a member of the

ARC for that meeting in order to assist in deciding this issue. The District is to pay a reasonable fee to the treating psychologist to attend that single meeting if such payment is necessary to procure his attendance.

6. The ARC shall prepare a plan for providing compensatory education services to the student. This plan shall be provided to the student's parents and shall be included in his special education folder. The District shall be responsible for ensuring that this plan is carried out.

7. The ARC shall meet as required to review and modify this compensatory education plan. These meetings must occur at least once every twelve months until such time as the ARC determines that the award of compensatory education is fulfilled.

8. All other forms of requested relief are denied.

So ORDERED this 15th day of May, 2004.

/s/ Clinton D. Kirk
Clinton D. Kirk, Chairperson
Exceptional Children Appeals Board

/s/ for Zaring Robertson
Zaring Robertson, Member
Exceptional Children Appeals Board

/s/ for Anthony Bracke
Anthony Bracke, Member
Exceptional Children Appeals Board

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **EXCEPTIONAL CHILDREN'S APPEAL BOARD FINAL DECISION AND ORDER** has been mailed, first class, postage prepaid to Marie Allison, Attorney at Law, P.O. Box 8128, Lexington, Kentucky 40533-8128; to Chenoweth Law Office, Robert L. Chenoweth, 121 Bridge Street, Frankfort, Kentucky 40601; to Pam Goins, Division of Exceptional Children Services, Kentucky Department of Education, 15th Floor, Capital Plaza Tower, 500 Mero Street, Frankfort, Kentucky 40601, this 15th day of May, 2004.

/s/ Clinton D. Kirk
CLINTON D. KIRK

KENTUCKY DEPARTMENT OF EDUCATION
DIVISION OF EXCEPTIONAL CHILDREN
SERVICES AGENCY CASE NO. 0203-22

Represented by
Hon. Marie Allison — **PETITIONER**

VS.

FAYETTE COUNTY PUBLIC SCHOOLS — **RESPONDENT**
Represented by
Hon. Robert Chenoweth

* * *

FINAL DECISION AND ORDER

* * *

HEARING OFFICER:
Pamela L. Weeks

HEARING CONDUCTED:
September 12, September 17, October 6, October 13, October 15, and October 29

DECISION RENDERED:
January 30, 2004

INTRODUCTION

On May 14, 2003, the Kentucky Department of Education, Division of Exceptional Children Services received a request for a due process hearing from ___ on behalf of ___ (hereinafter "the student"). This request was supplemented on May 22, 2003, by a document reflecting the student's legal guardian ___

consent for ___ (hereinafter referred to as "parents") to represent the student in educational matters. The hearing request alleged that the Fayette County Public Schools (hereinafter "LEA") failed to provide the student a free appropriate public education in the least restrictive environment. The Kentucky Department of Education (hereinafter "KDE") initially set the hearing for June 19, 2003, with the decision date set for July 7, 2003.

A prehearing conference was held on June 4, 2003, during which the Hearing Officer was notified that the student would be represented by counsel, Hon. Marie Allison. Both parties indicated that they would be unable to meet the hearing schedule set by the KDE and requested that the June 19, 2003 hearing date be cancelled. Counsel for the student requested time to familiarize herself with the case prior to scheduling another hearing date. A prehearing conference was held on June 11, 2003. Both parties requested an extension in order to allow for clarification of the issues by the Petitioner, review of the issues by the Respondent, and consideration of mediation to resolve the dispute. Counsel for the Petitioner filed a supplemental statement of the issues on June 19, 2003.

Multiple prehearing conferences were held in connection with this matter. Due to the complexity of the issues, and the anticipated length of the hearing, both parties requested extension of the hearing and decision deadlines. The extension was granted and the hearing was rescheduled for September 12, 17,

and 19, 2003. The deadline for filing a final decision was extended to October 24, 2003. Numerous motions, responses to motions, and prehearing orders were filed in this matter and have been entered into evidence as Hearing Officer Exhibits 1-28. The filing of pleadings and exchange of documents was conducted in a timely manner by both parties.

On September 12th, prior to commencement of the Hearing, the parties met in conference to address the Respondent's motions to exclude certain exhibits and testimony. During the conference the Petitioner raised the issue of inappropriate goals and objectives on the Individual Education Plan (hereinafter "IEP"). The Respondent objected to testimony being allowed on this issue stating that the issue had not been addressed in the Admission and Release Committee Meetings (hereinafter "ARC") or in the request for hearing. Moreover, the issue had not been raised in the Petitioner's supplemental statement clarifying the issues or in the multiple prehearing conferences on the issues. The Petitioner acknowledged that he had not specifically raised this issue, but believed that it was covered under the "including but not limited to" phrase in his supplemental statement clarifying the issues. The Petitioner also indicated that if he was unable to address the alleged inappropriate goals and objectives in this hearing he would request an additional hearing.

In order to avoid prejudice to the Respondent due to the lack of notice that the goals and objectives were at issue, and to avoid the need for an additional

hearing, the Hearing Officer suggested that the parties convene an ARC to address the goals and objectives in the IEP. The parties agreed and the Hearing Officer ordered that an ARC be convened prior to the next hearing date. The parties waived the five-day rule for disclosure of documentary evidence and review of potential witnesses as it related to this ARC meeting. The parties also waived written notice of the meeting. The ARC was convened, but not completed prior to the September 17th hearing date. The Hearing Officer cancelled the September 19th hearing date to allow the parties time to reconvene and complete the ARC meeting. The hearing date was rescheduled, and in subsequent conferences the parties requested additional days be scheduled for the hearing. The request was granted and three additional days, October 13, 15, and 29, were scheduled. The final day of the hearing was October 29, 2003.

The parties also requested additional time to submit post-hearing briefs following receipt of the transcript. The Petitioner was advised that granting these requests would significantly extend the timeline for issuing the final decision. The Petitioner and the Respondent explicitly waived any objection to the extension of the decision deadline. The deadline for submission of briefs was set for December 5, 2003. The Parties filed a Joint Motion to Extend Timelines on November 26, 2003, requesting additional time to submit briefs since they had not yet received the full transcript of the hearing. The request was granted and the deadline for submission of briefs was set for

December 12, 2003. On December 10, joint oral motion was made by the parties for another extension of the deadline to file briefs due to the late receipt of the transcript and the voluminous record. The deadline was extended to December 17, 2003. An Agreed Order was entered on December 12, 2003, with an express waiver of the decision time lines being entered by the Petitioner. It was agreed the extension was appropriate and in the interest of both parties. The parties submitted post-hearing briefs in compliance with the Agreed Order. The final Decision and Oder was rendered on January 30, 2004.

EXHIBITS

The exhibits offered by the parties in this matter were far too voluminous for individual listing in the text of this Decision and Order. The exhibits were presented in individually paginated notebooks. References to this material in the text of the Decision and Order will be to the individual page or pages rather than to the exhibit number. References to the exhibits will be designated as "P" for Petitioner's exhibits, "LEA" for LEA exhibits, and "J" for joint exhibits followed by the appropriate page numbers. A full listing of the exhibits entered in this case is attached hereto as Attachment "A."

References in this document to the transcript of this matter will be designated by "TE", the Volume number, and the page number or numbers. The court reporter inadvertently reversed the symbols in Volume

VI-A and Volume VI-B to Volume IV A and B. These volumes are referred to herein as they are listed on the transcript, IV-A and IV-B.

WITNESS LIST

Witnesses called in the student's case:

Dr. Ellen McIntyre
Annie Farris
Michael Muncy
Peggy Blanton
Karen Mullins-Botts
Brenda Brashear
Mabel Moss
Dr. John Sanders
Dr. Karen Demoss
Nancy Swigert
Lane Madden

Witnesses called in the LEA's case:

Tina Smith
Donna Brown
Judy Greathouse
Michael Muncy

STATEMENT OF THE ISSUES

The Petitioner alleged that the LEA failed to provide the student a free appropriate public education for the school years 1998-99 through 2002-03. The specific issues identified for hearing were as follows:

1. Whether the LEA failed to timely identify, refer and evaluate the student under the "child find" requirements of the Individuals with Disabilities Education Act (hereinafter "IDEA");

2. Whether the LEA failed to provide the needed extended school year services during summer breaks from 1999-2003;

3. Whether the LEA denied the student a FAPE by violating the procedural requirements of the IDEA in developing the behavioral intervention plan (hereinafter "BIP") outside of the ARC, and in failing to give prior written notice.

4. Whether the LEA failed to develop an appropriate IEP in 2003 by:

    a. Failing to provide appropriate occupational therapy services
    b. Failing to provide speech and language as a related service
    c. Failing to provide an adequate amount of specially designed instruction and supplemental aids and services
    d. Failing to inform the parents of the opportunity for parent counseling and training
    e. Failing to develop appropriate goals and objectives;
    f. Failing to propose a placement in the least restrictive environment

5. Whether the Petitioner is entitled to any remedy.

HELD: For the Petitioner in part and for the Respondent in part.

ISSUE ONE

Whether the LEA failed to timely identify, refer and evaluate the student under the "child find" requirements of the IDEA.

FINDINGS OF FACT:

1. The student was born February 4th, 1993 (J EX A-2). Testimony and exhibits admitted into evidence at the hearing as a whole, established the student has continuously resided in the region served by the LEA throughout all times at issue. This was not in dispute at the hearing.

2. The student attended BTW elementary school from 1998/99 through 2002/03 school years. (J EX 2). The student was identified and referred for evaluation as a student with possible disabilities under the IDEA on January 29th, 2003, during his fourth grade year. (J EX 456).

3. The LEA conducted a comprehensive evaluation of the student and completed an integrated report on April 28, 2003 for review by the ARC. (J EX 603). The Petitioner's school psychology expert, Dr. Demoss, described the report as a "beautiful report", "very thorough". (TE Vol. II-B, 215).

4. The ARC met on May 5, 2003, to review and act on the results of the evaluation. The ARC determined that the student was eligible for special education services under the category of multiple disabilities. He had been medically diagnosed with attention deficit hyperactivity disorder ("ADHD") and met eligibility requirements under other heath [sic] impairments, and under a specific learning disability (reading disability). (J EX 651). There was no dispute regarding the evaluation or eligibility determination for special education. The dispute arose around the timing of the referral, evaluation and determination of eligibility. The Petitioner alleged that the referral should have occurred in Kindergarten under the child find requirements of the IDEA.

5. The weight of the evidence is that the LEA had procedures in place to comply with the child find requirements of the IDEA and with the Kentucky special education regulations. Those procedures placed responsibility on the individual school building principal or designee to assist persons in understanding and completing the referral process when appropriate. (TE Vol. III, 309-310); LEA Procedures for Exception [sic] Children, Chapter 3, pp.40-48.

6. The director of special education has the responsibility to oversee programs for children with disabilities in the LEA. She supervises five special education administrators who, in turn, supervise other professionals such as school psychologists, diagnosticians, occupational therapists, and special education facilitators at the individual schools. (Vol.

1, 98-100) She is the one ultimately responsible for making sure child find policies and procedures are in place so teachers know when and how to make referrals. (TE Vol. I, 106).

7. The school principal and teachers testified that there was a referral process in place in the district and in their school, and that all school personnel received training regarding Child Find obligations and identification and referral of children with disabilities. (TE Vol. III, 79-83, 155, 184, 325). The principal acknowledged that there were no separate written procedures at the school level; the school followed the general LEA procedures. (TE Vol. III, 171-172).

8. At the school level there were a number of school personnel available to assist teachers and others with referrals and interventions for students who were having difficulty. These include a school psychologist, a child guidance specialist, reading specialists, the principal, special education teachers, a special education facilitator, and a student assistance team ("SAT") that is comprised of six staff members who are specifically trained to offer assistance. (TE Vol. III, 87-90).

9. The student assistant team at the school level consists of the school principal, the child guidance specialist, the school psychologist, the classroom teacher, the special education teacher, the special education facilitator, school nurse, and school social worker. (TE Vol. III, 95-96). The school started utilizing

the SAT in 1999 to assist teachers with strategies and interventions for students who are having repeated or chronic problems. (TE Vol. III, 92-93).

10. The LEA also has staff available at the district level to assist individual schools with identification, referral, and intervention strategies if needed and requested by the individual school. (TE Vol. III, 155, 184).

11. The process at the school level if school personnel had concerns that a student might have a disability was to notify the principal or special education facilitator, who would then refer to the SAT for review. The SAT would determine if appropriate interventions had been attempted, if additional interventions needed to occur, or if immediate referral to special education was needed. (TE Vol. III, 155-157). If school personnel clearly knew the student had a disability, or if a parent requested a referral, then a referral was made directly for evaluation for special education. (TE Vol., IV-B, 269-270).

12. Although the teachers' testimony was somewhat "fuzzy" on the exact details of the referral process at the school level, the weight of the evidence was that they knew they had an obligation to refer if they suspected a child had a disability, they knew there was a referral process in the school, and they knew the appropriate persons to contact within the school to assist them with referrals. (TE Vol. III, 155, 184, 325. The Hearing Officer finds as a matter of fact that the school personnel understood their duty to

refer children they suspected of having a disability, and knew the persons within the school that could assist them with a referral.

13. The student entered the school in Kindergarten. The student's report cards indicated some areas of concern, specifically behavior/social skills, beginning language skills, and math in the first two grading periods. The third grading period showed progress in all academic areas and in some of the social academic skill. By the fourth grading period he was meeting expectations in all academic areas, but continued to have many areas of concern in behavior/social skills. The report cards reflect academic progress in kindergarten. (J EX 1-4).

14. Upon review of the student's records, the Petitioner's literacy expert, Dr. McIntyre, noted that there were some indicators on the kindergarten reading screening that might cause concern, but stated "I wouldn't want a teacher to jump to conclusions that this is a child that has learning problems." (TE Vol. I, 47).The purpose of a screening test was to identify areas of concern, and find the kids that needed extra help in the classroom.(TE Vol. I ,48); (TE Vol. II-A, 131).

15. In the first grade the student continued to have problems with behavior/social skills, and the first grade teacher was aware that there were some concerns regarding basic reading skills. (TE Vol. III, 320). She implemented a number of reading interventions, including the Reading Recovery Program, small

reading group, added time for reading, "hands-on" material, and one-on-one work with a classroom assistant. (TE Vol. III, 322-323) (TE Vol. III, 152-154). She also consulted with the school psychologist regarding the student's behavior and was using a behavior plan. (TE Vol. V, 122).

16. It was noted in the first grade report card comments that the student was behind in reading, that interventions were being utilized, and that he was showing improvement. In the fourth grading period, the student was on grade level in math, but behind in reading (approximately 6-8 months behind based on the Gates-MacGinitie test) and spelling. He was turning in very little homework, and was having difficulty focusing and paying attention. (J EX 25-26). The teacher testified that she believed the interventions she was using were effective and the student was making progress academically. Progress in reading was shown in the testing during the Reading Recovery program. She also stated that she believed his behaviors were typical of immature 6 year old boy and would improve with more maturity. (TE Vol. III, 331,332, 334); (P EX 34). She referred the student for summer school to work on reading skills. (J EX 26); (TE Vol. III, 334).

17. In Kentucky, grades K-3 are considered to be the primary program and students are given the opportunity to progress at their own rate. Mastery of specific areas on progress reports relates to mastery by the end of the primary program. (TE Vol. III, 121). The rate at which a student progresses is effected by

environmental factors and also maturational factors particularly in very early grades (TE Vol. III, 204)

18. There was conflicting testimony as to whether or not the student's behavior, and/or deficits in reading in first grade were substantial enough to trigger a suspicion that he had a disability and needed special education. The Petitioner's experts generally testified that there were signs in first grade that might indicate that the student had ADHD, (TE Vol. II-B, 165-168, 241-42) and that his difficulties in reading might indicate a reading disability. (TE Vol. II-A, 70); (TE Vol. II-B, 230). On the other hand, the Petitioner's experts testified that the reading interventions were appropriate, and the Reading Recovery program was excellent and effective. (TE Vol. II-A, 133); (TE Vol. I, 49). Dr. McIntyre testified that she would have kept him in Reading Recovery for the entire first grade, and if he still wasn't progressing satisfactorily then look for more intensive intervention. (TE Vol. 1, 51). Additionally, the Petitioner's school psychology expert, Dr. Demoss, testified that it was "tricky" as to whether one would suspect a disability of ADHD at this point. (TE Vol. II-B, 171). Finally, virtually all of the school personnel and Petitioner's experts expressed caution with regard to referring young children who are having learning or behavior concerns to special education prematurely. It was important to first address the concerns with interventions and allow some time for the child to mature. (TE Vol. II-B, 210-211); (TE Vol. I, 47-48); (TE Vol. V, 127); (TE Vol. IV-B 279-281); (TE Vol. III,

140, 143). The weight of the evidence is that there was sufficient justification for not making a referral to special education in first grade, and that it was not unreasonable for the school personnel to continue to attempt pre-referral interventions.

19. In the second grade, the teacher noted concerns regarding the student's reading progress in the first and second grading period. In the 3rd grading period, the teacher noted that the student's "behavior problems have had a significant impact on his progress". In the 4th grading period the teacher continued to express concern that the behavior was having a significant impact, and also noted her concern about his lack of reading progress, stating she was "afraid that reading skills would continue to deteriorate over the summer." (J EX 45).

20. By the end of the 2nd grade the SRI reading test indicated that the student was reading "far below grade level", "at risk", and in the 1st percentile. (P EX 82)

21. The second grade teacher testified that she was very concerned about the students reading progress and that his behavior problems had a significant impact on his progress. He was low in reading and making "very, very slow progress" (TE Vol. III, 178-179, 186) (J EX p. 45).

22. The teacher implemented behavior management strategies, requested assistance from the school psychologist and the reading specialist. The school psychologist assisted with classroom interventions and

a social skills group. Reading interventions were also put into place. (TE Vol. III, 180-183, 195).

23. The teacher acknowledged that even with interventions in place his behavior was interfering with his learning and he was falling further behind in reading. (TE Vol. III, 112-114) (J EX 45).

24. The principal testified that during the 2nd grade "there was discussion about [the student] and the possibility of there being a reading disability". The discussion was held among the principal, classroom teacher, the school psychologist, and parent. (TE Vol. III, 117, 260)

25. The school psychologist also testified that she suspected in second grade that the student had ADHD. When asked "did you think that ADHD was having a negative impact on his education?" She answered, "Yes, I did". (TE Vol. V, 144). She also admitted that she talked with the teacher about her concerns. (Id. 154)

26. It is also undisputed that the teacher completed an ADHD school questionnaire at the parent's request for an evaluation being conducted by the Family Care Center. In completing the questionnaire she checked virtually all of the indicators for ADHD effects on school work as being "evident all or most of the time". (P EX 67-75)

27. Dr. Demoss testified that given the remarks on the report card and the ADHD questionnaire a referral would have been appropriate in second

grade.(TE Vol. II-B, 243-244). The principal also stated that this was sufficient information to suspect a disability (TE Vol. III, 129). The special education administrator stated that while there is no brightline threshold for referral, if interventions have been unsuccessful after 6-8 weeks or if there are repeated concerns a referral should be made. (TE Vol. III, 85).

28. By the end of the 2nd grade school year things were getting worse and the teacher acknowledged that maybe there was a problem that couldn't be addressed in the regular classroom setting (TE Vol. III, 187). When questioned about what signs to look for in making a determination of whether to suspect a student had a disability, the second grade teacher stated "obviously, if they're reading below grade level that's a big sign, but it usually has to be one grade level usually two before the big red flag comes up" . . . "in addition, if their ADD seems to be impacting their learning, then yes that would be a reason to refer them" (TE Vol. III, 184-185). However, in spite of all of these signs being present the teacher did not refer.

29. The second grade teacher acknowledged that she probably would have referred the student for special education except her understanding that the student's guardian did not want him referred to special education (TE Vol. III, 207-208, 212). The principal and school psychologist also testified that it was their understanding that the parent did not want the student referred for special education. (TE Vol. III, 117) (TE Vol. V, 144-147).

30. The parent denied that he ever told anyone at the school that he did not want special education services for the student. (TE IV, 231). The Hearing Officer does not make a determination as to whether the parent expressed negative opinions about referral for special education or not. The LEA had an affirmative child find duty on behalf of the student that could not be negated by the parent.

31. The hearing officer finds as a matter of fact that there was sufficient information by the end of second grade to suspect a disability and a possible need for special education, and that the school personnel did, in fact, suspect a disability.

32. There is substantial evidence that the student continued to have behavior problems that impacted his learning in the third grade, and continued to have sever deficits in reading skills. Report cards continued to show most social behaviors were still areas of concern. (J EX 131) The third grade teacher testified that the student was easily distracted and easily frustrated. (TE Vol. IV, 14). Scores on the SRI reading test indicated that he was far below grade level, "at risk", and in the 1st percentile. (P EX 136). Primary phonics and phonemic skills were lacking. (TE IV 35), and the student was reading at the mid first grade level in third grade. (J EX 138).

33. The teacher testified that she consulted with the special education teachers on how to help the student. She implemented a number of interventions, including preferential seating, peer tutoring,

one-on-one college assistants, Book IT Reading Program, and ESS. (TE Vol. IV, 14, 25); (J EX 138).

34. In spite of the interventions, the student had not mastered the exit criteria for transition from P3 (3rd grade) to Intermediate (4th grade). (P EX 254-257) (TE Vol. VI, 30-40). His final report card for P-3 indicated that he had mastered none of the items related to language and reading skills, spelling, or math, although the expectation was that he should have mastered most of them by the end of P-3. The teacher recommended an additional year in primary.. (J EX 131); (TE Vol. IV 35, 43).

35. School Psychologist, Dr. Demoss, testified that an additional year of primary would not be an appropriate intervention if he were simply repeating more of the same things that already had not worked. (TE Vol. II-B, 226-227).

36. The parents opposed the student remaining an additional year in primary, and he was promoted to the fourth grade. The teacher recommended ESS summer school following the third grade. (J EX 227).

37. The student's difficulties with behavior and academic progress, particularly in the area of reading, continued through the fourth grade. The teacher noted concerns that social growth and basic subjects were below grade level. (J EXs 339, 340, 341, 342, 344). Interventions included: ESS, Great Leaps reading program, computerized reading/math programs, small reading group, preferential seating,

modified assignments, extended time on assignments. (J EX 459).

38. The parent notified school personnel in a conference on September 24, 2002 that the student had been medically diagnosed with ADHD. The principal requested a copy of the written report. (J EX 385-386). The report was provided to the school in November, 2002.

39. The principal referred the student to the SAT on November 6, 2002. Reason for referral: reading below grade level for the past 3 years, difficulty attending to tasks and staying focused, rarely ever completes work. He is impulsive and often gets into trouble for behavior or non-compliance. (J EX389). A referral for evaluation for special education was initiated on January 29, 2003. (J EX 456).

40. During a meeting on February 4, 2003, the ARC determined that the referral was appropriate and warranted a full evaluation. (J EX 472). A comprehensive evaluation was conducted and the final integrated report was completed on April 28, 2003. (J EX 603).

41. Although results from the Weschler Intelligence Scale for Children: Third Edition indicate the student is functioning in the average range of intelligence, the student has severe deficits in reading. (J EX 603-619). At the end of fourth grade the student had difficulty decoding basic second grade words, his reading scores on standardized tests were in the first to fifth percentile, and his fourth grade report cards

reflected very low grades and problem behavior. The weight of evidence clearly indicated that the student's academic achievement in reading was not commensurate with his cognitive ability.

DISCUSSION:

The Petitioner alleged that the LEA denied the student a FAPE from kindergarten through fourth grade by failing to timely identify the student and initiate a referral under the IDEA's "child find" requirements. The child find requirements of the IDEA at 20 U.S.C. 1412(a)(3), impose an affirmative obligation on the LEA to identify, locate and evaluate all children who (1) have disabilities and need special education and related services, 34 C.F.R. 300.125(a)(1)(i), or (2) are **suspected** of having disabilities and being in need of special education and related services, 34 C.F.R. 300.125(a)(2)(ii) (emphasis added). Children so identified must then undergo an initial evaluation to confirm eligibility. 34 C.F.R. 300.125; 34 C.F.R. 300.531-300.533.

In *Robertson County School System v. King*, 24 IDELR 1036 (6th Cir. 1996) [unpublished], the Court stressed the school system's affirmative duty to seek out and evaluate all potentially eligible children within its jurisdiction, noting that a parent's failure to make a referral or request an evaluation did not relieve the LEA of its child find obligation. In the case of a student already in the public school, the duty arises with the school district's knowledge of facts

tending to establish a suspected disability and a possible need for special education services. 34 C.F.R. 300.125(a)(ii);707 KAR1:300 Section 1.

The LEA is required to "have in effect procedures that plan and implement a child find system to locate, identify, and evaluate each child . . . (3) who is in or out of school; (4) who might need special education and related services." 707 KAR1:300 Section 1. At the district level, the LEA had written procedures in place to comply with the child find requirements of the IDEA and with the state special education regulations. LEA Procedures for Exceptional Children, Chapter 3 at 40-48. Under these procedures the LEA placed responsibility on the individual school building principal or designee to assist persons, school personnel or non-school personnel, in understanding and completing the referral processing when appropriate. However, it was ultimately the LEA's responsibility to ensure that the individual schools had referral procedures in place that complied with the IDEA, and that personnel in the schools followed the procedures.

The school personnel all testified that there was a referral process in place, both in the district and in their school. The principal, the special edcuation teacher, the special education facilitator, the school psychologist, and, since 1999, the Student Assistance team were all available within the school to assist with identification and referral of students in need of special education services. In addition, the LEA had resource persons available at the district level to assist the individual schools. All school personnel

testified that they were trained on the child find requirements and on identifying disabilities, including ADHD and learning disabilities.

The Petitioners argued that there was some confusion at the school level about the specific details of making an initial referral, and that written documentation of the process and pre-referral intervention was either non-existent or haphazard. These arguments are not without some merit. However, the weight of the evidence was that school personnel understood they had an obligation to refer children suspected of having a disability, understood there was a process in their school for making such referrals, and knew the specialized personnel in the school who could assist with a referral. No allegations were made and no evidence was presented that anyone made a request for referral or evaluation that the school personnel ignored. Consequently, the issue in this case is whether the information available to school personnel should have triggered a suspicion that the student had a disability and needed specially designed instruction before the initial referral was made in January 2003.

Beginning in kindergarten and continuing through first grade, general screening tests and report cards indicated that the student was having difficulty in certain areas; specifically, social skills and beginning reading and language skills. Virtually all of the witnesses who testified, including the Petitioner's expert, stated that these difficulties

would not necessarily indicate a disability or a need for special education, and that it would be inappropriate to rush to identify a five or six year old child under these circumstances. Young children come to school at widely varying stages of maturity and developmental readiness for learning. The appropriate course of action was to note areas of concern and implement classroom and individual interventions to address those areas of concerns.

During these first two school years the school implemented a number of interventions, including: behavior management strategies, specialized reading instruction, special reading groups and individual assistance, the Reading Recovery Program, and group counseling. There was substantial evidence that while the student continued to have problems in behavior and in reading, he did respond to some of the interventions and made some progress in kindergarten and first grade. The school personnel considered his academics from the perspective of the primary program and testified that his behavior and learning problems were not atypical of immature young boys. The teachers and the Petitioner's expert, Dr. McIntyre, noted that in these early grades it was important to see how young children progressed with interventions before jumping to conclusions and labeling them as disabled prematurely. Dr. Swigert, another witness for the Petitioner, stated that the early interventions were good.

As the Respondent noted in its brief, there is no bright line rule or rubric for school personnel to follow

as to when a student should be referred due to a suspected disability. The weight of the evidence was that given the student's age, the nature of the primary program, and his response to the informal interventions, it was not unreasonable that the school personnel did not refer for special education in kindergarten or first grade. The teachers noted and addressed areas of concern and responded with appropriate interventions in kindergarten and first grade.

However, by the middle of the second grade the documentary evidence clearly showed that while the student had made some progress in reading and writing, he was now significantly below grade level and continued to exhibit behaviors that impeded his learning. The second grade teacher implemented behavior management strategies and requested assistance from the school psychologist and the reading specialist. The school psychologist placed the student in a social skills group and assisted the teacher with classroom interventions. Interventions to address the reading concerns were also put into place.

The second grade teacher testified that even with interventions in place his behavior problems were interfering with his learning and he was falling further behind in reading. The teacher, school psychologist, and principal all testified that they discussed the possibility of a reading disability and referral to special education amongst themselves and with the parent. The school psychologist also discussed with

the teacher concerns that the student had ADHD which was negatively impacting his learning. In addition, the teacher completed an ADHD questionnaire on the student that, even to the untrained eye, clearly identified the student as having virtually all of the indicators of ADHD. It is at this point in the second grade that there is substantial evidence that the school personnel had sufficient information to trigger a suspicion that the student had a disability and that they did in fact suspect a disability.

While there are Sixth Circuit cases that discuss child find generally, none give guidance as to when school personnel should know a student needs to be referred due to a suspected disability. The Respondent suggests the standard stated in *Clay T. v. Walton County Sch. Dist.*, 952 F. Supp. 817 (M.D. Ga. 1997). In *Clay T.* the Court concluded that "in order to establish that the school violated the identification requirements of the IDEA, Plaintiff must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate." *Id.* at 823.

In the case suggested by the Petitioner for guidance, *Texas v. Corpus Christi Indep. Sch. Dist.*, 31 IDELR 41 (SEA 1999), the Hearing Officer set a lower standard, stating "that 'suspicion' seems to connote a relatively low threshold of pertinent information, particularly keeping in mind that the issue at this stage is whether school officials should or should not make a *referral* for evaluation. The issue is not

whether the student should be IDEA eligible, or 'labeled' or provided with services, or pulled out'." *Id.*

While neither case serves as precedent in this jurisdiction, it is clear that in the present case the information available by the end of second grade would not only meet the standard for referral in the *Corpus Christi* case, but would also meet the higher standard stated in the *Clay T.* case. By the end of second grade, numerous interventions had been attempted, repeated concerns had been noted in the student's records, the teacher testified his behavior continued to impede his learning, his reading level at the end of the second grade was in the first percentile, and the school personnel, by their own admission, suspected a reading disability and ADHD. The school personnel "overlooked clear signs of disability", and even though they discussed the possible need for special education among themselves they failed to make a referral. The LEA had an affirmative duty to refer the student for evaluation for special education services, and they failed to fulfill that duty in a timely manner. *Clay T., Supra.*

In *W.B. v. Matula,* 67 F.3d 484, 501 (3rd Cir. 1998), the court held that a student must be identified within a reasonable time after school officials are on notice of behavior likely to indicate a disability, noting that a delay of 6 months would not be reasonable. To hold otherwise would eviscerate the child find duty and thwart legislative intent. "It can come as no surprise to a reasonable school official that children must be located and evaluated within a

reasonable time, and thus we conclude that a school official who failed to carry out his child find duty within a reasonable time would understand that what he is doing violates that [duty]." *Matula* at 501. This duty was not negated by any opinion about special education that may have been expressed by the student's guardian, nor by the guardian's failure to request a referral or an evaluation. *Robertson County School System v. King, Supra.*

Failure to timely identify and evaluate a child with a disability can result in a deprivation of a FAPE for a student who should have been identified, possibly entitling him to remedies for that deprivation accruing from the time the LEA first should have suspected the disability. *See e.g., Robertson, Supra.* While failure to comply with the procedural requirements of the IDEA is not a *per se* denial of a FAPE, procedural violations that deprive an eligible student of an IEP or result in the loss of educational opportunity will constitute a denial of FAPE. *Knable v. Bexley City School Disteict* [sic], 238 F.3d 755, 765 (6th Cir. 2001); *See Renner v. Bd. of Education*, 185 F.3d 635, 642 (6th Cir. 1999); *Babb v. Knox County Sch. Sys.*, 965 F.2d 104, 109 (6th Cir. 1992). The LEA did not make a referral until January, 2003, the middle of the student's fourth grade year. The student was not evaluated until late in the fourth grade year and had no IEP proposed until the end of fourth grade. Consequently, the student was deprived of access to the specially designed instruction and related services

he needed in the third and fourth grades to receive educational benefit. *Knable v. Bexley, Supra.*

The student continued to have behavior problems throughout the third and fourth grades that impeded his learning. At the end of the third grade the student had mastered none of the skills needed to progress to the fourth grade, and according to the teacher was reading at a mid first grade level. The comprehensive evaluation completed by the LEA in the fourth grade and the reading evaluations conducted by the Petitioner's experts showed severe deficits in reading. At the end of fourth grade the student had difficulty decoding basic second grade words, his reading scores on standardized tests were in the first to fifth percentile, and his fourth grade report cards reflected very low grades and continuing problem behavior.

The weight of the evidence is that the failure to refer the student for evaluation in the second grade deprived him of an IEP in third and fourth grade. This failure resulted in a loss of educational opportunity and constituted a denial of a FAPE.

CONCLUSIONS OF LAW:

1. The LEA had in effect procedures that plan and implement a child find system to locate, identify, and evaluate children with disabilities who might need special education and related services. 707 KAR 1:300 Section 1.

2. The LEA had an affirmative duty to identify, locate and evaluate children suspected of having disabilities and being in need of special education and related services. 34 C.F.R. 300.125(a)(2)(ii); *Robertson County School System v. King, Supra.*

3. The school personnel had sufficient information to suspect a disability, and admittedly did suspect a disability, by the end of the student's second grade year in May, 2001. A referral for evaluation for special education was not completed until January 29, 2003. The school personnel failed to fulfill their child find duty within a reasonable time and thus violated the procedural child find requirements of the IDEA. 34 C.F.R. 300.125(a)(2)(ii); *W.B. v. Matula, Supra.*

4. The failure to identify, refer and evaluate the student in a timely manner deprived the student of an IEP in his third and fourth grade school years. The failure resulted in the loss of educational opportunity and constituted a denial of a FAPE. *Knable v. Bexley City School District, Supra.*

ISSUE TWO

Whether the LEA failed to provide the needed extended school year (ESY) services during summer breaks from 1999-2003.

FINDING OF FACT:

1. All of the findings of fact contained in the analysis of prior issues are incorporated herein.

2. The overall record indicates that the student did not receive ESY services during any summer break throughout his five years at the LEA school. This was not in dispute at the hearing.

3. The student's records reflected some concern over the years regarding regression during breaks in instruction. This was documented in teacher comments on report cards and parent teacher conference summaries, (J Ex., pp. 45, 339); (TE Vol.III, pp. 181, 182), and in test scores. (J Ex., pp. 44, 575); (TE Vol. II-B, p. 304-306).

4. Testimony from the Petitioner's reading specialists affirmed the concern regarding regression during breaks in instruction. (TE Vol. I, p. 52); (TE Vol. II-A, p. 158).

5. The student received summer school instruction during the summer breaks following the student's second grade school year and his third grade school year through the LEA's Extended School Services ("ESS") program. (TE Vol. V, 69). ESS programs are provided to students with or without disabilities based on criteria established by the school based councils. Instruction may be offered in reading, writing or math based on identified need for additional work. (TE Vol. IV-B, 235-236)

6. No evidence was presented regarding the content or exact nature of the instruction provided to the student in the ESS programs following second and third grade.

7. The student was evaluated and determined to be eligible for specially designed instruction in May of his fourth grade year (J Ex. 651). At the time the ESY issue was raised, the student was eligible to receive special education services but had not yet received any services since the IEP was still being developed. (TE Vol. 11-B, p. 310).

8. A series of ARC meetings were held in May 2003 to develop the student's IEP. During the ARC meeting on May 14, 2003 the parents requested that the LEA provide ESY services for the summer. The ARC summary notes reflect that "ESY – consensus not reached. [Parents] disagree that [student] does not have identified ESY services. [Principal], as District Representative indicated that No ESY services are identified at this time." (J Ex F-112, 772). There was no additional information noted on the IEP form or the ARC summary minutes regarding the refusal to provide ESY.

9. The May 14, 2003 ARC meeting was recorded and the portion related to the ESY discussion was entered into evidence at the hearing. The recorded ESY discussion revealed that the reason given by the LEA for the refusal to provide ESY was that no IEP had been implemented yet, and with no IEP in place

there was no data to make a determination for ESY. (audio tape, 5/14/03) (TE Vol.IV-B, p. 308).

10. Although the IEP noted that consent had been given for special education, this was apparently a mistake because the LEA had gotten consent from the parent prior to completing the IEP and determining placement. Due to this mistake the LEA considered that there was no consent for special education. (TE Vol. IV-B, p. 308).

11. There was conflicting testimony from the LEA personnel regarding the criteria for a determination of eligibility for ESY services. The Elementary Special Education Administrator indicated that the only data that is relevant to a determination of ESY is data from an implemented IEP. (TE Vol. III, p.61). When the principal was asked if the LEA's position was that only data derived from an implemented IEP was considered for ESY determination, she answered "certainly not". (TE Vol.III, 306-314).

12. The Principal referred to the LEA's policies and procedures related to ESY and listed 3 criteria for determining need for ESY: 1. If already in special education look at regression/recoupment data derived from IEP. If it takes more than 4 weeks to recoup information then consider ESY; 2. Look at trends in functioning during and after breaks; and 3. consider professional opinions related to regression/ recoupment. (TE Vol. III, p. 306-307).

13. The LEA's procedures for determining eligibility for ESY were summarized by the LEA's

resource specialist in the meeting minutes of the ARC held on October 2, 2003 as follows: "Five things are looked at and it is not exhaustive: 1. regression and recoupment of IEP goals over breaks; 2. trends in progress data; 3. tests throughout the year; 4. observations of professionals; 5. opinions of professionals." Determination of ESY is not based on any single criterion. (J Ex G-22, p.1403). This summary accurately reflects the LEA's policies and procedures on ESY.

14. Although LEA personnel testified that documentation and data from an implemented IEP are not the only criteria used to determine ESY eligibility, (Vol. III, p.311), the weight of the overall evidence is that the only criteria considered by the ARC was whether the student had data from an implemented IEP. (J Ex. F-112, p. 772)

15. There was no evidence that the ARC reviewed any of the data, test scores, or reports from teachers that had been collected in the student's file prior to making a determination that there was no identified need for ESY. (J Ex. F-112, p. 772); (TE Vol III, p. 307). The substantial weight of the evidence is that the ARC failed to conduct a regression/ recoupment analysis of any kind, and it's determination of need for ESY services began and ended with the single fact that there was no data from an implemented IEP.

16. The record reflects that the principal did offer to refer the student for ESS services for the

Summer 2003, but she did not know if he was actually offered the services. (TE Vol. III, p. 303, 304).

17. The parent sent a letter to the principal on June 12, 2003, requesting that the principal follow through on providing summer educational services for the student. (LEA Ex. 14). The principal admitted that she received but never responded to the letter because the parents had initiated the present due process proceeding. (te Vol. III, p.239, 240). The weight of the evidence is that the student was not provided with ESS services in the summer of 2003.

18. The parents also requested that the student be provided ESY services during the winter break in December, 2003 and during the summer break in 2004. The ARC did not refuse to provide ESY during those breaks, but deferred making a decision until more information could be collected relative to progress on IEP goals following implementation of the IEP. The ARC noted that it would revisit this issue later in the school year. (J Ex. G-22, p. 1402-1403);(TE Vol. IV-B, p. 238-239).

DISCUSSION:

The LEA must provide ESY programming to eligible students when necessary to provide a FAPE. ESY means specially designed insteuction [sic] and related services that are provided to a child with a disability beyond the normal school year in accordance with child's IEP at no cost to the parents. 707 KAR 1:280 Section 1(25).

Pursuant to 20 U.S.C. 1412(a)(1), the federal regulations set forth the following requirements:

(a) **General**

(1) Each public agency shall ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

(2) Extended school year services must be provided only if a child's IEP team determines, on an individual basis, in accordance with §§300.340-300.350, that the services are necessary for the provision of FAPE to the child.

(3) In implementing the requirements of this section, a public agency may not –

(i) Limit extended school year services to particular categories of disability; or

(ii) Unilaterally limit the type, amount, or duration of those services.

(b) **Definition**. As used in this section, the term **extended school year services** means special education and related services that –

(1) Are provided to a child with a disability –

(i) Beyond the normal school year of the public agency;

(ii) In accordance with the child's IEP; and

(iii) At no cost to the parents of the child; and

(2) Meet the standards of the SEA.

34 CFR 300.309; 707 KAR 1:290 Section 8.

The specific analysis used in determining eligibility for ESY services has been left to the states and local districts, and to judicial interpretation of the requirements of the IDEA. It is generally a multi-factored determination with a key factor being a regression/recoupment analysis. The LEA has set forth the factors to be considered in determining a student's need for ESY in its Procedures for Exceptional Children, 2002, pp 35-37.

The ARC makes its determination of the need for ESY, which is not based on any single criterion, by using the following:

A. trends documented by IEP implementers and based on on-going progress data relative to all IEP goals, which have been taught in order to assess length of recoupment time, as follows: 1. . . . ; 2. . . . ;3. . . . ;

B. when there have been no breaks in instruction **or there is uncertain data, which can be analyzed to obtain valid assessment of recoupment**, 1. tests and observation data collected over a period of time; and 2. the opinion of

> professionals, based on a professional individual assessment of student regression and recoupment of skills (emphasis added)

An ESY program is provided when the recoupment time for a student or youth with a disability exceeds that of similar aged peers who are not disabled and who experience the same lapse in instruction. The average and expected time for students without disabilities is within a range of six to eight weeks for a break in instruction of a comparable amount of time. LEA procedures p. 35, citing *Armstrong v. Kline*, 476 F. Supp, 583 (E.D. Pa. 1997).

The Sixth Circuit has held that ESY services are appropriate when they prevent significant regression of skills or knowledge that would seriously affect the student's progress toward self-sufficiency. *Cordrey v. Euckert*, 917 F.2d 1460, 1474 (6th Cir. 1990). The Court concluded that the fact that a child would attain a greater level of educational progress with 12 month programming was not sufficient to justify ESY services. Nor was that fact that the student would regress if instruction was interrupted sufficient to justify ESY. Rather, it must be demonstrated, "in a particularized manner relating to the individual child, that an ESY is necessary to avoid something more than adequately recoupable regression." *Id.* at 1473.

In a more recent case, *MM ExRel. CM V. School Dist. Of Greenville County*, 303 F. 3d 523, 537-538

(4th Cir. 2002), the Fourth Circuit reviewed the standard in the Sixth Circuit and similar standards in the Fifth and tenth [sic] Circuits, and adopted a standard that amalgamated those standards into a single test. Under the test the Petitioner must "establish that ESY would prevent significant regression of skills or knowledge retained by the child so as to seriously affect his progress toward self-sufficiency, or that benefits accrued to the child during the regular school year would be significantly jeopardized if he were not provided [ESY]". Id. at 537.

The Sixth Circuit also explored the nature of the criteria or evidence necessary to employ the regression/recoupment analysis, and concluded that it was not necessary that the student produce "hard empirical proof" of actual prior regression to the serious detriment of his educational progress. "Where there is no such empirical data available, need may be proven by expert opinion, based upon a professional individual assessment." *Cordrey* at 1471, 1472.

In the present case, the Petitioner alleged that the LEA failed to provide a FAPE to the student from 1999 – 2003 by failing to offer ESY services. A determination has been made in this hearing that a referral for special education should have been made in the second grade school year. As ESY is special education, the student was not eligible for consideration for ESY services until the summer of 2001. 34 CFR 300.309. The LEA had not yet identified the student as eligible for special education, so did not consider ESY. However, the record reflects that the

student was offered and participated in summer school instruction in the summer of 2001 and in the summer of 2002. The instruction was provided through the LEA's Extended School Services (ESS) program.

The summer ESS program was for students with or without disabilities who met the school based council's criteria in curriculum areas identified as needing additional work. The student met the criteria for needing additional instruction in the summer following the 2nd grade and in the summer following 3rd grade. The Petitioner presented no evidence that the instruction provided during the summer was inappropriate, nor was any evidence presented that the summer instruction did not benefit the student. In fact, there was no evidence presented at all regarding the nature of the instruction provided to the student. Therefore, there is insufficient evidence in the record to make a determination as to whether the student was denied educational opportunity due to the failure of the LEA to identify the student and consider ESY in the summers following 2nd and 3rd grade.

The student was referred for an evaluation for special education in January 2003, was evaluated, and was determined to be eligible for special education as a student with multiple disabilities. In May 2003, a series of ARC meetings were held to develop the student's IEP. During one of these meetings on May 14, 2003, the parents requested that the student receive ESY services for the summer of 2003. The

request was refused and the student did not receive ESY or ESS services during the summer.

The summary of the May 14th ARC meeting simply indicated that no consensus was reached and the principal made a decision that there was no identified need for ESY services. The ARC meeting was taped. In the discussion regarding ESY, the reason given for denial of ESY services was that the IEP had not been implemented. Therefore, there was no IEP data collected from which to make an ESY determination. There was no evidence in the ARC summary, the taped ESY discussion, or in the testimony at the hearing that the LEA considered any criteria other than whether there was an implemented IEP from which data would have already been collected. There was no evidence that the LEA engaged in any analysis at all regarding the student's need for ESY services. The record reflects that the discussion began and ended with the fact that the student did not have an IEP implemented.

The LEA contended in its brief that ESY could not have been determined for the student because such has to be "in accordance with the child's IEP." 34 C.F.R. 300.309(b)(1)(ii). The LEA is correct that *if* the ARC had analyzed the student's need for ESY and determined that ESY services were necessary, it could not have offered ESY without an accepted IEP and permission for special education services. However, that is not the scenario we have in the present case. Here the ARC was in the process of developing

the IEP and refused ESY services without ever analyzing the student's need for ESY.

The weight of the evidence is that the only criterion the LEA was willing to consider was regression/recoupment data from an implemented IEP. This is in direct violation of the LEA's own ESY procedures which clearly state that need shall not be based on any single criterion, and which set forth other means of analyzing need if there is "uncertain data." Before making a decision the ARC "reviews the on going progress data, trends in data, tests observation results and professional opinions as presented by the ARC members to make a determination regarding the possible requirement for provision of ESY services." LEA procedures at 36. The record reflects an absence of any review prior to making the decision to refuse ESY.

The Sixth Circuit has concluded that hard empirical data from an IEP is not required to prove a need for ESY. If no such data is available need may be shown through professional opinion. *Cordrey* at 1472. The courts have also clearly rejected the rule that a child must actually regress during the summer (so that data can be collected) before ESY services can be offered. *MM ex. rel. DM v. School Dist. of Greenville County*, 303 F. 3d 523, 537 (4th Cir. 2002); *Cordrey v. Euckert*, 917 F. 2d 1460, 1470 (6th Cir. 1990); *Polk v. Central Susquehanna Inter. Unit 16*, 853 F.2d 171, 184 (3rd Cir. 1988).

The LEA's failure to consider and analyze the student's need for ESY services for the summer of 2003 constituted a procedural violation of the IDEA and of the LEA's own policies and procedures. As noted earlier in this opinion, while failure to comply with the procedural requirements of the IDEA is not a *per se* denial of a FAPE, procedural violations that result in the loss of educational opportunity will constitute a denial of FAPE. *Knable v. Bexley City School District,* 238 F.3d 755, 765 (6th Cir. 2001); *See Renner v. Bd. of Education*, 185 F.3d 635, 642 (6th Cir. 1999); *Babb v. Knox County Sch. Sys.,* 965 F.2d 104, 109 (6th Cir. 1992).

There was sufficient evidence that the student may have needed ESY services as displayed by regression in the test scores, teacher comments on report cards and in conferences, and the principals offer to seek ESS services for the student for the summer of 2003. The weight of the evidence is that the failure to even consider the need for ESY resulted in a loss of educational opportunity and thus constituted a denial of FAPE. Additionally, because the LEA failed to complete any analysis or review before refusing ESY, the notice contained in the conference summary could not, and did not, satisfy the notice requirements of 707 KAR 1:340 Section 3. The short statement in the ARC summary that no ESY services were identified failed to state what documents were reviewed, what the students needs were, what regression/recoupment information was considered, and

essentially any basis for the conclusion that no ESY services were identified.

CONCLUSIONS OF LAW:

1. All of the conclusions of law contained in the analysis of prior issues are incorporated herein.

2. The LEA is required to provide ESY services to students if the ARC determines that the services are necessary to provide FAPE. The determination is based on multiple factors with a key factor being a regression/recoupment analysis. The LEA refused to offer ESY services in the summer of 2003 without any review or analysis to determine the student's need for such services. This was in direct violation of its own procedures, and a procedural violation of the IDEA. 20 U.S.C. 1412(a)(2); 707 KAR 1:290 Section 8, LEA Procedures for Exceptional Children, 35-37. *Cordrey v. Euckert, Supra.*

3. The notice of refusal of action contained in the ARC summary minutes failed to meet the notice requirements of 707 KAR 1:340 Section 3.

4. The failure to conduct a review or multi-factored analysis to determine if ESY services were necessary to provide the student a FAPE denied the student educational opportunity and constituted a denial of FAPE. *Knable v. Bexley, Supra.*

5. The student was not eligible for ESY services in the summer of 1999 or in the summer of 2000.

Therefore, there was no violation of the IDEA. 34 C.F.R. 300.309; 707 KAR 1:290 Section 8.

6. The student was provided with summer school instruction in the summer of 2001 and the summer of 2002 under the LEA's ESS program. The Petitioner provided no evidence that the instruction was inappropriate, nor did he provide any evidence that the student did not benefit from this instruction. Therefore, the Petitioner failed to meet the burden of proving by a preponderance of the evidence that the instruction provided by the LEA was inappropriate such that he was denied educational opportunity due to the failure to identify the student as eligible for ESY.

ISSUE THREE

Whether the LEA denied the student a FAPE by violating the procedural requirements of the IDEA in developing the behavioral intervention plan ("BIP") outside of the ARC, and in failing to give prior written notice

FINDINGS OF FACT

All Findings of Fact contained in the analysis of prior issues are incorporated herein.

1. The ARC determined on February 5, 2003, that the referral for special education was appropriate and warranted a full evaluation including a functional behavior assessment ("FBA"). (J EX 472).

The FBA was completed on March 28, 2003 (P EX 560-570).

2. The ARC reached consensus during an ARC meeting on May 13, 2003, that a behavior plan was needed to address behaviors that were interfering with the student's success in school. However, a dispute arose as to whether or not the BIP was required to be totally developed within the confines of an ARC meeting. (J EX 750-751)

3. Over the course of several lengthy ARC meetings, the ARC developed a social skills goal and short-term objectives to address the students problem behavior. (J EX 1422-23). Statements describing the modifications needed to address the social skills goal and objectives were listed in the IEP, and included: Behavior plan; preferential seating; activity and/or movement breaks; weekly progress reports to be sent home; daily behavior reports to be sent home. (J EX 1424).

4. The resource specialist described a modification as anything that helps the student to be successful in the regular education setting, and the BIP is used as an intervention to support the student's success in the classroom. (T.E. Vol IV-A, 19). The Petitioner suggested a definition from a document from the National Association of School Psychologists. (J EX 1378). There is no definition of modifications in the IDEA, federal or state regulations. The Hearing Officer finds that a BIP could fit under the definition proposed by the resource specialist or the plain

language in the Kentucky regulations. It could also fit under the Petitioner's proposed definition as a change in "teaching strategies, standards, . . . expectations . . . environmental structuring" which provide access and "fundamentally alters" the standard or expectations.

5. The details of the modification are not spelled out in the four corners of the IEP. The special education administrator gave the example of a sensory diet as a modification, stating that you wouldn't develop the details of the diet in the ARC meeting, nor would you write out the entire diet in the IEP. (TE Vol. II-B, 291). The parents disagreed with the BIP being listed as a modification and wanted the entire BIP described in detail within the IEP document.

6. Under the caption "Program modifications and supports if any required for school personnel to implement IEP", it was noted that the special education teacher, resource specialist and/or school psychologist would meet with the student's teachers to review the specifics of monitoring and reporting progress on the IEP. The manifestations of the student's disability and other specific information would also be transmitted to the teachers. The school principal verifies whether the modifications and supports have been completed. (J EX 1424). The resource specialist testified that this included training the staff on implementing and monitoring progress of the BIP. (TE Vol. IV-A, 44).

7. The LEA personnel described the BIP as a strategy that can be used to address behavior that impedes a student's learning. It is developed in an ARC meeting when it involves a disciplinary action such as a suspension. In other circumstances the ARC includes the BIP as a modification in the IEP, and works on the details of the BIP in team meetings. Parents are invited to participate in team meetings. (te Vol. I, 204, 218); (te Vol. IV-A, 11-12, 21, 70); (J EX 1332-40).

8. The parents met with the school psychologist to work on a draft BIP prior to the May 13, ARC meeting. (J EX 743);(J EX 774); (TE Vol. V, 166). During the ARC meeting on the 13th the LEA staff indicated that the details of the BIP would be developed in a team meeting outside of the ARC meeting. Four ARC meetings had been held to develop the IEP and it was not yet completed. The principal noted that they were close to the 60 day deadline and they needed to concentrate on completing the IEP. (J EX 750-51);(TE Vol. V, 167-168).

9. The details of the BIP are developed outside of the ARC meeting to allow time for brainstorming, and to allow for fluidity in the plan. The plan is reviewed at the ARC meeting. (TE Vol. IV-A, 9, 11-12); (J EX 1332-40).

10. There was substantial evidence that the BIP needs to be a fluid document that can be modified as needed to meet the needs of the student. Once a plan is implemented it needs to be tweaked on a

regular basis if a particular reinforcer isn't working, or a reactive strategy stops being effective, etc. (TE Vol. IV-A, 14-15);(J EX 765); (J EX 1332-40); (TE Vol. V, 152). The student's psychologist was in agreement with the LEA staff on this point. (TE Vol. IV, 133-134)

11. School personnel testified that developing the BIP totally within the confines of an ARC meeting would require the BIP to be so general that it would be ineffective. It is difficult to think of every possible scenario and to know how the student will respond to each of the strategies. It would be impractical to call repeated ARC meetings to tweak the BIP. (Vol. IV-A, 15, 54).

12. Development of a behavior plan and necessary revisions to the plan require substantial time in "brainstorming" to determine what will be effective for the particular student. (TE Vol. IV-A, 14-15). LEA personnel acknowledged that such brainstorming could take place within the context of an ARC. (TE Vol. I, 236-37); (Vol II-B, 265). However, the weight of the evidence was that requiring a full ARC meeting to be convened for each brainstorming session would be impractical, and detrimental to the process of implementing timely interventions for the student. Teachers need to use their discretion to adapt the BIP as the child's needs change. (TE Vol. IV-A, 14-15, 54); (TE Vol. II-B, 268, 271, 275); (TE Vol. V, 165-166).

13. The school personnel met on May 20, 2003, in a team meeting to work on developing the BIP. A behavior plan was developed utilizing the information from the FBA, the draft BIP developed by the parents, and the behavior data collected by the fourth grade teacher. (J EX 792); (TE Vol. IV-A, 23).

14. The parents and the student's psychologist were invited to attend the team meeting to develop the BIP. (J EX 1340); (TE Vol. IV-A, 121). The parent admitted that he was invited, but chose not to attend, and also admitted that he was never denied the opportunity to participate in developing the BIP. (TE Vol. IV, 362).

15. The student's psychologist, Dr. Sanders, addressed the importance of parents having input in the behavior plan so that the parents and teachers could work on the problematic behaviors both at school and at home. (TE Vol. IV 134). He testified that he saw no problem with this input being given either in an ARC meeting or outside of an ARC meeting. (TE Vol IV 180). This testimony was consistent with the testimony of the school personnel. (TE Vol V, 169-70); (TE Vol II-B, 292); (Vol. IV-A, 12); (J EX 1338); (J EX 613).

16. The LEA personnel acknowledged that a parent has the right to disagree with any component of the IEP, including the BIP. The parent had the opportunity to do that in the ARC meetings, and was offered that opportunity in the team meeting. (te Vol. 1, 239; (te Vol. II-B, 264); (te Vol. V 166-168); (J EX

1332-40). If consensus is not reached on the BIP in team meeting the parent can call an ARC meeting. The BIP would not be implemented until parent had reviewed it and offered input. (TE Vol. II-B 269, 292); (J EX 770).

17. The substantial weight of the evidence is that strategies, including positive behavior interventions, strategies and supports to address the student's behavior were considered and discussed at ARC meetings. Behavioral/social goals and objectives, modifications and specially designed instruction related to addressing the problem behavior were all addressed in ARC meetings. (J EX 1332-1340); (TE Vol. II-B 259-262) The Hearing Officer finds as a matter of fact, that even though the final details of the BIP were developed outside the ARC, the parent was never denied the opportunity to participate in any aspect of developing the BIP.

DISCUSSION

The Petitioner argued that the BIP must be totally within the confines of an ARC meeting, and that it must be fully set forth within the four corners of the IEP document. He alleged that when the LEA decided to list the BIP as a modification in the IEP, and held "brainstorming" meetings outside of the ARC to work on the details of the BIP, it violated the procedural requirements of the IDEA and denied the student a FAPE.

The IDEA sets forth a specific list of items that must be included in a student's IEP. 20 U.S.C. 1414(d)(1)(A)(i-viii), *See* 34 C.F.R. 300.347. A BIP is not included in the list of required items.[1] However, the IDEA and the supporting regulations do require that in developing the IEP the ARC must consider special factors, specifically:

> In the case of a child whose behavior impedes his or her learning or that of others, ***consider***, if appropriate, strategies including positive behavioral interventions, strategies and supports to address the behavior.
>
> 20 U.S.C. 1414(d)(3)(B)(i); 34 C.F.R. 300.346(a)(2)(i) (emphasis added).

If in considering such special factors, the ARC determines that:

> A child needs a particular device or service (including an intervention, accommodation, or other program modification) in order for the child to receive FAPE, the IEP team must include a ***statement*** to that effect in the child's IEP.
>
> 34 C.F.R. 300.346(c). (emphasis added).

This requirement that a statement of the program modifications must be included in the IEP is reiterated at 34 C.F.R. 300.347(a)(3): The IEP shall include

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[1] 20 U.S.C. 1415(k)(1)(B) compels development of a BIP under certain disciplinary actions not present in this action.

> A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a ***statement*** of the program modifications or supports for school personnel that will be provided for the child –
>
> (i) To advance appropriately toward attaining the annual goals;
>
> (ii) To be involved and progress in the general curriculum . . .;
>
> (iii) To be educated and participate with other children with disabilities and non-disabled children . . .

The Kentucky special education regulations at 707 KAR 1:320 Section 5(2)(a) and (4), and 707 KAR 1:320 Section 5(8), essentially mirror the federal regulations. There is nothing in these regulations that would indicate that the full body of a BIP must be included in the four corners of the IEP.

In the present case the ARC determined that the student did have behaviors that impeded his learning. A functional behavior assessment ("FBA") was conducted and reviewed by the ARC. A social goal and objectives were developed by the ARC and included in the IEP. Strategies were considered by the ARC to address the behavior, and it was determined that one of the strategies, among others, would be a BIP. A statement to that effect was included in the IEP as a modification.

The LEA has never suggested that the BIP was unnecessary to assist in addressing the student's behavior, nor has the LEA attempted to exclude the parent from participating in the development of the BIP. The parents were invited to, and received notice of, all ARC meetings and the BIP team meeting. The point of contention was whether the IDEA required that every detail of the BIP be discussed and developed during an ARC meeting.

The Petitioner is correct in his assertion that the IDEA favors and encourages parental participation in development [sic] the child's education program. The concerns of parents and the information that they provide regarding their children must be considered in developing and reviewing the IEP. 34 C.F.R. 300.343(iii) and 300.346(a)(1)(i). The Petitioner also points to the Department of Education comment, Federal Register, Vol. 64, No. 5, which notes that parents are equal participants in developing, reviewing and revising the IEP.

The Petitioner asserts that implicit in the parent participation requirements is the rule that school personnel may never discuss or prepare any component of the child's education program outside of a properly constituted ARC. However, The Sixth Circuit Court of Appeals clearly rejected this assertion in both *Burilovich v. Board of Educ.*, 208 F.3d 560 (6th Cir. 2000), and *N.L. v. Knox County Schools*, 315 F.3d 688, 693 (6th Cir. 2003). In *Burilovich*, the parents argued that they were denied meaningful participation in the IEP process because the school staff held

two meetings outside of a properly constituted IEP (ARC) meeting to discuss IEP goals and alteration of an existing IEP. The parents were not invited to these two meetings. The Court stated

> Plaintiffs have not indicated how they were prevented from participating in the development of the IEP. The parents attended a December 1996 IEPC, strongly expressed their views at the March 1996 IEPC, had the opportunity to participate in the May 1996 IEPC, and also expressed their views through letters and telephone conversations with district staff. Furthermore, plaintiffs have cited no support for their implicit assertion that schools may never discuss a child's IEP, goals, objectives, or educational methodology out of the presence of the parents. For these reasons, plaintiffs have failed to demonstrate that they were denied participation in the IEPC process. *Id.* at 568 (citations omitted).

Similarly, the Court in *N.L. v. Knox County Schools*, 315 F. 3d 688 (6th Cir. 2003), found that meetings held by school officials to discuss an assessment report and eligibility requirements prior to a formal IEP meeting did not deny the parent meaningful participation in the IEP process. The Court noted that while the IDEA's supporting regulations prohibit a completed IEP from being forced on parents, school officials "could prepare reports and come with preformed opinions regarding the best course of action for the child as long as they are willing to

listen to the parents and parents have the opportunity to make objections and suggestions." *Id.* at 694. 34 C.F.R. 300, App. A, No. 32.

In the above cited cases, the parents were actually excluded from the meetings. In the represent case, the parents were not excluded from any meeting and participated in numerous ARC meetings in which behavior concerns, behavior goals and objectives, strategies, positive behavior interventions and supports, and the BIP were discussed. The parents also met with the school psychologist individually to discuss the BIP. The school personnel testified that the BIP was a strategy, intervention or support included in the IEP as a modification. Because the development of a BIP required many hours of brainstorming to determine the appropriate interventions, reinforcement, reinforcement schedules, etc., the LEA preferred to work on the plan in a team meeting with the parents, and then bring the BIP back to a formal ARC meeting for review before implementation. The parent admitted that he was invited to the team meeting but chose not to attend.

The educators and student's psychologist also stressed the necessity of developing a BIP that is a fluid document in order for it to be an effective intervention. The teachers must be able to modify the BIP when they find that certain reinforcers are no longer reinforcing, or the reinforcement schedule needs to be shortened or lengthened, or certain strategies simply aren't working. As a practical matter, it would be counterproductive to convene a formal ARC meeting

every time the plan needed minor "tweaking". Moreover, the Courts have been clear that educational methodology is primarily the responsibility of the educators and deference will be given to their decisions. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982); *Burilovich, Supra* at 566.

There is substantial evidence that the parents have been given ample opportunity for meaningful participation, and that they have in fact been very active and vocal participants in development of the student's educational program. They have been involved in all of the ARC meetings, a total of 9 from May 2003 to October, 2003, some lasting as long as an entire day to allow the parents to express their concerns and suggestions. Additionally, the record is replete with documentation of numerous parent/teacher conferences, e-mails, and correspondence in which the parents have shared their concerns and suggestions regarding the student's program. There is no evidence that the LEA has attempted to exclude the parent from participating in the development of the BIP or any other aspect of the student's IEP.

The Hearing Officer doubts that developing the details of the BIP outside of the ARC amounted to even a technical procedural violation of the IDEA. However, even if a procedural violation did occur, "failure to comply with the procedural requirements of the Act will constitute a denial of FAPE only if such violation causes substantive harm to the child or his parents. Substantive harm occurs when the procedural violations in question *seriously infringe*

upon the parents opportunity to participate in the IEP process." *N.L. v. Knox County Schools, Supra* at 693, citing *Knable v. Bexley*, 238 F. 3d at 765. It is clear from the substantial weight of the evidence that the parents were not denied the opportunity to participate in the development of their child's IEP. Therefore, developing the details of the proposed BIP in a team meeting did not constitute a denial of FAPE.

The Petitioner alleged violations of the Prior written notice requirements in his request for the hearing, but during the hearing conceded that it was a non-issue. However, he again raised the issue numerous times in his 146 page Post-Hearing Brief. The Hearing Officer reviewed all of the alleged violations. The ESY notice was addressed hereinabove. Without going into detail on each remaining allegation in this already lengthy opinion, the Hearing Officer finds that none of the alleged violations, if violations at all, seriously infringed upon the parents opportunity to participate in the IEP process. *Knable v. Bexley, Supra*. As noted above the parents attended all of the lengthy ARC meetings, a total of nine (9) meetings from May, 2003 through October, 2003, and were active, well informed, and vocal participants in the process.

CONCLUSIONS OF LAW

1. All of the conclusions of law contained in the analysis of prior issue are incorporated herein.

2. The substantial weight of the evidence is that strategies, including positive behavioral interventions, strategies and supports to address problem behavior were considered by the ARC. Behavior/social goals and objectives, modifications and specially designed instruction related to addressing the student's behavior were all addressed in ARC meetings. 20 U.S.C. 1414(d)(3)(B)(i); 34 C.F.R. 300.346(a)(2)(i).

3. The BIP and several related components of the BIP were listed in statements under program modifications in the IEP. 34 C.F.R. 300.346(c) and 347(a)(3). There is nothing in the regulations that would indicate that the full body of the BIP must be included in the four corners of the IEP document.

4. There is no evidence that the parents were ever prevented from meaningfully participating in the development of the BIP or any other aspect of the student's IEP. To the contrary, there is substantial evidence that the parents had ample opportunity to participate in the process and were active and vocal participants. The team meeting to develop the details of the BIP did not constitute a denial of FAPE. *Burilovich, Supra*; *Knable v. Bexley, Supra*.

5. There is no evidence that any of the alleged violations of the prior written notice requirements seriously infringed upon the parents opportunity to participate in the IEP process, and thus did not constitute a denial of FAPE. *Knable v. Bexley, Supra*.

ISSUE FOUR

Whether the LEA failed to propose an appropriate IEP in 2003

FINDINGS OF FACT:

1. All of the findings of fact contained in the analysis of the prior issues are incorporated herein.

2. Following a comprehensive evaluation of the student, the LEA convened ARC meetings on May 5, May 7, May 9, May 13, and May 14, 2003, to develop an IEP for the student. Additionally, ARC meetings were held during the pendency of the hearing on September 16, September 19, September 25, and October 2, 2003. The ARC documents revealed that all of the ARCs were properly constituted and convened in compliance with state and federal regulations. The parents received written notice of the meetings and attended all of the ARC meetings. They either received or waived notice of their procedural rights at each meeting. (J EXs 639, 669, 681, 747, 756, 1290, 1318, 1361, 1395)

3. The ARC summary minutes revealed that the ARC conducted lengthy meetings reviewing evaluation data, establishing the Present Levels of Educational Performance (PLEP), developing goals and objectives, and specifying the specially designed instruction, program modifications, supplementary aids and services, and related services necessary to achieve his goals and objectives. The record reflects

that the parents were active and vocal participants in all of the meetings. Id.

4. As noted in the Statement of Issues, number 4, the Petitioner challenged many of the components of the proposed IEP. Most of the issues related to the various components of the IEP were resolved in the ARC meetings held during the pendency of the hearing. (TE Vol IV-B, 363-368). The remaining unresolved issues concerned the request for a math goal in the IEP; the social goal, objectives, and BIP; and the proposed placement.

The math goal.

5. The Petitioner requested that a math goal be placed in the student's IEP. The student's math scores in the Integrated Report in certain subcategories, most notably quantitative concepts, were low, (J EX 603-619), and his report cards and Star Math test indicated some deficits in his math skills. (J EX 389); (P EX 131). However, the school psychologist testified that his overall standardized score in math was in the average range on the integrated report. (TE Vol. V, 175).

6. The ARC noted that there were some weaknesses in math. However, his teacher indicated that he knew his math facts, but the ADHD was affecting his ability to stay on task and complete assignments. When on task he could do the math problems. The principal noted after an analysis of the student's math test, that he consistently missed problems that

required reading. The school personnel indicated that by addressing the reading and ADHD, they felt the reading would improve. If adequate progress did not occur, the ARC could reconvene to address math. (J EX 1371, 1404-1405); (TE Vol. V, 173). The overall weight of the evidence was that these were reasonable decisions based on the data and the teachers knowledge of the student.

The Social/Behavioral Objectives and BIP

7. The proposed BIP identifies three target behaviors: 1. Follow directions – zero negative response; 2. Stay in area/seat; 3. Focus on class instructions and assignments (on task). The BIP includes of positive behavior interventions; a simple reinforcement schedule every 30 minutes; a back up reinforcement schedule for goals met two times daily; a bonus point system; an instructional strategy to teach alternative behavior; a menu of positive reinforcers to choose from; and reactive strategies to address the problem behavior when it occurs. There is a six step reactive strategy plan, the first four steps to stop the behavior occur in the classroom. Step 5 is a ten-minute time out of classroom, debrief and fill out "time to think" form. The final step, if the other steps don't stop the behavior, is a referral to the principal. (J EX 792-796).

8. The BIP meshes with the Student Code of Conduct when the student reaches step 6 in the

reactive strategies, but many strategies and modifications occur prior to this step (TE Vol. IV-A, 41).

9. The parent raised objections in the ARC meeting to the use of SAFE in the reactive strategies, the lack of specific items that the parent wanted added to the BIP in regard to what interventions the principal would use if the student was sent to the principal's office. (J EX 1332-1333), (TE Vol. V, 54). As noted hereinabove, SAFE is Step 6 of the reactive strategies after other strategies have been attempted and failed to stop the behavior. If it was found that SAFE was ineffective with the student after implementation of the IEP, that part of the BIP could be revisited.

10. The Parent also objected to the wording of the social goal and objectives and the lack of specific dates for implementing each objective and each item on the BIP. As to the dates, the parent's concern was that they would not know exactly when certain components were being worked. The school personnel explained the reasoning for the wording of the objectives and the measurements used. The objectives addressed the present levels of performance, and they were supported by the FBA and the data from the classroom. Additionally, the parents would receive daily behavior reports and weekly progress reports so would be continuously updated on the implementation of the BIP and IEP objectives. (J EX 1328-29; 1332-1340); (TE Vol.IV-A, 18-20).

11. In addition, the resource specialist analyzed each of the objectives on the IEP for compliance with the requirement that they be measurable and testified at length as to how each met the state and LEA's standard for measurability. (TE Vol. IV-B, 144-176). The weight of the evidence is that the objectives do meet state and LEA criteria.

12. The student's psychologist attended the ARC on September 19, 2003, and raised no objections to the behavior goals and had no major problems with the BIP, although he would prefer to have 1 or 2 target behaviors rather than 3 target behaviors. (TE Vol. IV, 131-132). School personnel agreed that students with severe behavior problems should only work on 1 or 2 target behaviors. However, they did not consider the student's behavior to be severe, and believed from their experience with the student that the 3 target behaviors were appropriate and were focused on supporting the student to be more successful in school. (TE Vol. IV-A 26, 43).

13. The behavior resource specialist testified in detail regarding the development of the students BIP and the components contained therein and noted that the parents concerns as well as the data from the classroom and the FBA were all taken into consideration in developing the details of the BIP (TE Vol. IV-A, 25-40). The HO finds as a matter of fact that BIP is a comprehensive, detailed behavior plan with a variety of strategies; including positive behavior interventions and strategies to address the student's individual needs.

The Proposed Placement

14. During the meeting on May 14, 2003, the ARC discussed placement options for the student. The ARC considered the following: resource for reading and writing and collaboration for social studies, science and math; and collaboration for all subjects with no resource. (J Ex. 769).

15. The regular classroom would consist of approximately 24 fifth grade students taught by a regular education teacher. The resource room would consist of a maximum of 8 students taught by a special education teacher trained to work with students with learning and behavioral disabilities. (TE Vol V, 197).

16. The special education teacher was present in the ARC meeting and suggested that the reading and writing instruction take place in the resource room because of the intense level of instruction needed. There would be fewer distractions less social pressure, and fewer opportunities to act out due to the small class size in the resource room. (J Ex. 768)

17. The school psychologist, having worked with the student and having observed him in the regular class environment, testified that the student could benefit in the regular classroom in most areas. However, she went on to state that the student was very distractible and needed intense instruction in reading in the resource room without all the distractions inherent in a large classroom. (TE Vol. V 187-188).

18. The school psychologist also noted that the student had already received one on one reading instruction in the regular classroom prior to the development of the IEP and had not done well. He received little benefit from this instruction because of his difficulty concentrating with all the activity going on in the regular classroom. (TE Vol. V 188-191).

19. The testimony of the Petitioner's experts, Dr. McIntyre and Ms. Swigert, was also supportive of the need for intensive one on one or small group instruction in reading with minimal distractions (Vol. I 32-33) (Vol. II-A 62). Ms. Swigert testified that, ideally, one on one reading instruction would not be done in the regular classroom but in a more individualized setting. Small group instruction in a regular classroom with same reading level students would be difficult because the same reading level would be first graders (TE Vol. II-A 127-28, 150-151).

20. Under questioning by Petitioner's counsel, most of the witnesses did acknowledge that it was possible to deliver the specially designed reading instruction in the regular classroom. (TE Vol I 33-34), (TE Vol. II-A 27-128). However, the substantial weight of the testimony was that it would be much more difficult to make satisfactory progress and would not be as beneficial as instruction in the resource room. Id., (Vol. VI-B 244-248).

21. All ARC members, other than the parents, reached consensus that the specially designed instruction needed in reading and writing should be

delivered in the resource room for approximately 30 minutes per day, and all other instruction delivered in the regular classroom. That action was proposed in the May 14, 2003 ARC meeting. (J Ex. 768), (TE Vol IV-B 244-248). The proposed placement was rejected by the parents in the May ARC and again in the ARC meetings held during the pendency of the hearing. (J EX 768-770, 1428).

22. The parent objected to the student receiving specially designed reading and writing instruction in the resource room because he was concerned that pulling the student out of the regular classroom, even for a small part of the day, would be harmful to the student's self-esteem. (TE Vo. III, p. 63); (J Ex. 1425). On the other hand, the parent requested, and received, pull out for occupational therapy ("OT") in cursive writing rather than the collaborative OT in the regular classroom proposed by the LEA. (J Ex, p. 1342). The Hearing Officer finds that the parent's request for pull out in one area mitigates the concern that pull out in another area would be harmful to the student's self-esteem.

23. The student's private psychologist, based on his conversations with the student, expressed the opinion that the student did not want to be singled out. (TE Vol. IV, p. 149). The psychologist acknowledged that he had never observed the student in the school environment, and that he was not familiar with the provision of resource room services at the student's school (TE Vol IV, 144-152, 183)

24. In contrast to the private psychologists testimony, the school psychologist who had worked with the student since first grade testified that the student realized that he needed less distraction and had expressed no concerns to her about being pulled out of the regular classroom for specialized instruction. She also noted that many children move in and out of the regular classroom throughout the day, thus diminishing the sense of being singled out. (TE Vol. IV, p. 192, 193).

25. The Hearing Officer finds the testimony of the school psychologist to be more credible and persuasive as it relates to the potential harmful effects of a resource placement. The school psychologist had worked with and observed the student in the school environment, and was familiar with the regular classroom and resource room environment at school. The private psychologist had not observed the student at school, was unfamiliar with the regular and resource environments at the school, and had not spoken to any of the student's teachers about the student.

26. The special education administrator clarified that if any potential harmful effects were noted following implementation of the IEP, the ARC would meet immediately to address the issue. The parent or any teacher could call for an ARC meeting at any time. (J Ex 772), (TE Vol. IV-B 244-248).

DISCUSSION:

The Petitioner alleged that the LEA failed to propose an appropriate IEP in 2003 that would provide meaningful education to the student. In *Board of Education of the Hendrick Hudson School District v Rowley*, 458 U.S. 176 (1982), the United States Supreme Court held that the IDEA requirement of a free appropriate education is satisfied when the school district provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 204. The Court suggested a two part inquiry to determine if a student's program was appropriate: First, has the school district complied with the procedures set forth in the IDEA? Second, is the IEP reasonably calculated to enable the child to receive educational benefit? *Id.* at 206-207. The procedural aspects have been addressed in other parts of this decision.

The Petitioner also challenged the substantive aspect of the program alleging that the program proposed by the LEA was not reasonably calculated to confer educational benefit. In *Rowley*, the court held that a school district has met its legal mandate if it offers a basic floor of opportunity for the student, and concluded that the IDEA does not require that a student be provided with the best possible education or educational services that maximize the student's potential. *Rowley*, at 458 US 175, 200. While the school district is not required to maximize the student's potential, the educational benefit provided

must be more than de minimis. *Doe v. The Board of Education of the Tullahoma City Schools*, 9 F. 3d 455, 459 (6th Cir. 1993). The Sixth Circuit attempted to clarify the standard for educational benefit with its automotive analogy, stating that the district has a duty to provide the educational equivalent of a Chevrolet and not a Cadillac. *Id.*

The Petitioner challenged many of the components of the proposed program. Most of the issues related to the various components of the IEP were resolved in the ARC meetings held during the pendency of the hearing. The remaining unresolved issues concerned the request for a math goal in the IEP; the social goal, objectives, and BIP; and the proposed placement. The weight of the evidence, as noted in the findings of fact, is that the ARC made reasonable decisions regarding the need for a math goal in the IEP. Additionally, the decisions made regarding the social objectives were based on the students individual needs, his present levels of performance and data from the classroom, and the FBA.

Similarly, as noted in the findings of fact, the BIP is a comprehensive, detailed behavior plan with a variety of strategies; including positive behavior interventions and strategies to address the student's individual needs. The IEP that has been proposed includes a variety of specially designed instruction, modifications, and supports for the student. Again, without going into extensive detail in this already lengthy opinion, the substantial weight of the evidence is that the IEP proposed by the LEA clearly is

reasonably calculated to provide meaningful educational benefit under the standard set by *Rowley* and its progeny. The placement issue is discussed in detail below.

The Petitioner alleged that the student's IEP was inappropriate because the LEA proposed placing the student in a resource room to provide specialized reading and writing instruction, thus violating the least restrictive environment ("LRE") provisions of the IDEA. The Petitioner preferred that the student receive all of his instruction in the regular classroom, and argued that full inclusion with supplementary aids and services must be tried before the student could be "pulled out" for specialized instruction.

The IDEA requires that:

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . 20 U.S.C. 1412(5)(B); *See* 34 C.F.R. 300.550(b)(1); 707 KAR 1:350 Section 1.

The regulations interpreting Section 1412(5)(B) at 34 C.F.R. 300.552(a)(2) provide that the educational placement of each child with a disability is based on his or her IEP. "Educational placements under Part B

must be individually determined in light of each child's unique abilities and needs, to reasonably promote the child's educational success." *Notice of Interpretation*, Appendix A to 34 C.F.R. Part 300, Question 1.

The regular classroom in the school the student would attend if not disabled is the first placement option considered, and the student is not removed from the regular classroom solely because of needed modifications to the general curriculum. 34 C.F.R. 300.552(e). However, the IDEA does not require that every student be placed in the regular classroom full time regardless of abilities and needs. *See Gillette v. Fairland Bd. of Educ.*, 932 F. 2d 551, 554 (6th Cir. 1991). (The Court rejected the parent's argument that the school was required to place the student with learning disabilities in all regular classes). The recognition that the regular classroom may not always be appropriate is reflected in the requirement that districts provide a continuum of alternative placements to meet the unique education needs of students with disabilities. 34 C.F.R. 300.552(b); 34 C.F.R. 300.551. The proper focus is the "benefit" to the child, and the regular classroom may not always be appropriate. *See eg. Hudson by Hudson v. Bloomfield Hills Pub. Schs.*, 108 F.3d 112 (6th Cir. 1997); *Ronker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1982).

Following the student's evaluation, a number of properly constituted ARC's were convened to develop the student's IEP. There were no procedural challenges to the ARC process or the development of the

IEP, other than those already addressed hereinabove. The parents were in attendance at all of the ARC meetings. The student's placement was discussed numerous times, and it is clear from review of the meeting minutes that placement in all regular classes with supplementary aids and services was considered by the ARC. In fact, under the IEP proposed by the LEA, most of the student's specialized instruction is to be delivered in the regular classroom utilizing the collaborative model the parent requested. The point of contention between the parties was the specialized reading and writing instruction the student was to receive in the resource room.

The student has severe deficiencies in reading and has difficulty decoding even basic second grade words. He has ADHD and by all reports is very distractible. All of the persons evaluating the student, including the Petitioner's experts, recommended intensive one-on-one or small group instruction in order for the student to progress satisfactorily in reading. The teachers and the Petitioner's reading expert testified that the intensive one-on-one instruction in reading should be provided in a pull-out setting, noting that some of the necessary modifications would be difficult to implement in a regular classroom without disrupting other students or without the student being distracted by all the activity going on in the class. The teachers and school psychologist testified that one-on-one reading assistance had already been tried in the regular classroom

and that the student had not benefited due to the distractibility.

When considering the appropriate placement in which to implement the IEP the LEA shall ensure that consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs. 34 C.F.R. 300.552(d). The parent's only objection to the student receiving reading instruction in the resource room was his concern that singling the student out for special instruction would have a potentially harmful effect on the student's self-esteem. However, the guardian argued for, and received, pull out for occupational therapy rather than the collaborative model proposed by the LEA. In addition, the school psychologist who had worked with the student since first grade testified that the student knew he needed additional help and had expressed no concern about being pulled out for specialized instruction in reading. Many students move in and out of the regular classroom, thus greatly reducing the sense of being "singled out".

The weight of the evidence is that the ARC took the parent's concerns regarding potential harmful effects on self-esteem into consideration, and also took into consideration that potential harmful effects to quality of service if the student were to receive his reading instruction in the regular classroom. With his distractibility and his need for intense one on one small group instruction the ARC determined he could not progress satisfactorily in the regular classroom.

The judgment of the ARC was that the LRE in which the student could be educated satisfactorily and receive meaningful benefit was the resource room.

Educational decisions made at Admissions and Release Committee meetings are entitled to a presumption of appropriateness and the burden is put on a party attacking these decisions to show that they are not appropriate. *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986) *citing Tatro v. Texas*, 703 F.2d 823, *aff'd in part, rev'd in part on other ground, Irving Independent School District v. Tatro*, 468 U.S. 883 (1984).

The Sixth Circuit specifically adopted this allocation of the burden of proof in placement decisions, stating in *Dong v. Bd. of Educ. of Rochester Community Schools*, 197 F.3d 793 (6th Cir. 1999), "we adhere to the cases holding that a party challenging the terms of an IEP should bear the burden of proving that the placement was not appropriate." *Id.* at 799. *See Renner v. Bd. of Educ. of Pub. Schs. of Ann Arbor*, 185 F. 3d 635, 642 (6th Cir. 1999); *Doe v. Bd. of Educ. of Tullahoma City Schools*, 9 F.3d 455, 458 (6th Cir. 1993) (the challenging student and his parents "bear the burden of proving by a preponderance of the evidence that the IEP devised by the Board is inappropriate."). If the procedural requirements of the IDEA are met in developing the IEP, greater deference is to be afforded to the LEA's placement decision. *Dong* at 800. *See Tucker by Tucker v. Calloway County Bd. of Educ.*, 136 F. 3d 495, 502 (6th Cir.

1998). The Petitioner has not met the burden of proving that the decision to place the student in a resource room for specialized reading and writing instruction was inappropriate.

CONCLUSIONS OF LAW:

1. All of the conclusions of law contained in the analysis of prior issues are incorporated herein.

2. The LEA developed the proposed IEP in a series of properly constituted ARC meetings, and proposed the educational placement based on the student's IEP and his unique needs and abilities. 34 C.F.R. 300.552(a)(2); 707 KAR 1:350 Section 1(6).

3. When reviewing the continuum of alternative placements, the ARC considered the potential harmful effects on the child and the potential harmful effects of the quality of services that he needed. 34 C.F.R. 300.552(d); 707 KAR 1:350 Section 1(8).

4. Given the intensity of the student's needs in reading and writing instruction, and his high distractibility, the weight of the evidence supports the ARC decision that the resource room is the LRE in which the student can be educated satisfactorily in reading and writing and receive meaningful benefit. *Id.*; *Gillette v. Fairland Bd. of Educ., Supra*; *Hudson by Hudson, Supra*; *Roncker v. Walter, Supra.*

5. The Petitioner had the burden of proving by a preponderance of the evidence that the placement decision was not appropriate. He did not meet this

burden. *Dong v. Bd. of Educ. of Rochester Community Schools, Supra.*

6. The IEP proposed by the LEA was calculated to provide meaningful educational benefit in the least restrictive environment. *Rowley, Supra*; *Doe v. Board of Education of the Tullahoma City Schools, Supra.*

ISSUE FIVE

Whether the Petitioner is entitled to any remedies.

FINDINGS OF FACT:

1. All of the findings of fact contained in the analysis of the prior issues are incorporated herein.

2. The student has, through counsel, submitted a list of requested damages in his post-hearing brief. That document requests five years of compensatory education, various amounts of financial compensation, reimbursement for private counseling and up to five years of future counseling for psychological harm caused by the LEA, and five years of consultation from the DePaul School regarding literacy and assistive technology. It concludes by asking the Hearing Officer to order the LEA to revise its Child Find Policies and Procedures.

3. The student was provided with many appropriate pre-referral interventions. The primary educational deprivation took place in the area of reading.

The deficits in reading affect all other subject areas. Virtually all the witnesses agreed that intensive instruction in reading was necessary for the student to "catch up". The Petitioner's reading experts estimated that it would take approximately 100-125 hours of intensive one-on-one reading instruction, at least one hour per day, to pull the student's reading skills up to where they need to be. (TE Vol. II-A, 62); (TE Vol. I, 31).

4. The only evidence of psychological harm to the student was Dr. Sanders' opinion that the student's problems may have been exacerbated by the lack of access to certain school services and that this may have affected his self-esteem. Counseling needs for low self-esteem would depend on what the school did in the upcoming year with an implemented IEP. (TE Vol. IV, 153, 181).

CONCLUSIONS OF LAW:

1. All of the conclusions of law contained in the analysis of prior issues are incorporated herein.

2. 20 U.S.C. Section 1415(3)(2) [sic] clearly allows a hearing officer or a court to award compensatory education for a LEA's violation of the IDEA.

3. It is well established that an award of compensatory education is appropriate if a student is denied educational services that should have been provided all along. *See Phil v. Massachusetts Dep't of Education*, 9 F.3d 184 (1st Cir. 1993); *Mrs. C. v.*

Wheaton, 916 F.2d 69 (2d Cir. 1990); *Lester H. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990); *Meiner v. State of Missouri*, 800 F.2d 749 (8th Cir. 1986); *Jefferson County Board of Education v. Breen*, 853 F.2d 853 (11th Cir. 1988).

4. The Sixth Circuit of the United States Court of Appeals has implicitly (if not explicitly) authorized the awarding of compensatory education in its decision in *Thomas v. Cincinnati Board of Education*, 918 F.2d 618 (6th Cir. 1990). That opinion's point of emphasis was that technical noncompliance with the requirements of IDEA that did not result in educational deprivation to the student should not result in an award of compensatory education. *Id.* However, it is a logical corollary that that finding that noncompliance with the requirements of IDEA that *does* result in educational deprivation to the student *should* result in an award of compensatory education. Language in a later case also confirms the Sixth Circuit's position that compensatory education is an appropriate remedy. *Hall v. Knott County Board of Education*, 941 F.2d 402, 407 (6th Cir. 1991).

6. Courts commonly award compensatory education for the length of time equivalent to the time the student was denied services. The Ninth Circuit took a less mechanical approach, finding that an award of compensatory education is an equitable remedy that should be determined on the basis of the student's individual needs and circumstances. A student is entitled to the compensatory education time required to provide him FAPE. *Parents of Student W.*

v. Puyallup Sch. Dist., 21 IDELR 723 (9th Cir. 1994); Letter to Kohn, 17 EHLR 522(OSEP 1990).

7. The student is entitled to an award of compensatory education for the denial of FAPE resulting from the LEA's failure to timely refer and evaluate the student, and for its failure to properly consider and determine ESY services for the summer of 2003. *See eg Robertson County School System v. King, Supra.*

8. No authority was offered to support the awarding of monetary damages. The general rule is that monetary damages may not be awarded within the context of a Due Process Hearing. *See Hall v. Vance Cty. Bd. Of Educ.*, 774 F.2d 629 (4th Cir. 1985).

9. There is insufficient evidence that the school caused psychological harm to the student that would warrant the awarding of five future years of counsel by a private psychologist of the student's choosing. The ARC determines the related services educationally necessary for the student. The LEA has psychologists, social workers, and child guidance specialists all qualified and available if the student is in need of such services to receive FAPE.

10. The Petitioner presented no evidence that the student or LEA requires consultation for five years from the DePaul School. The LEA has reading specialists, and resource specialists to consult on assistive technology. The fact that certain school personnel within the LEA failed to meet their child

find obligation in a timely manner does not render everyone in the school district incompetent.

11. The Hearing Officer has no authority to order the LEA to change its policies and procedures.

ORDER

1. The ARC shall convene a meeting within seven days of receipt of this Decision and Order to act on the orders contained herein.

2. An award of compensatory education for the student is Ordered as follows:

a. One hundred twenty-five hours of one-on-one instruction in reading skills and language skills consistent with the recommendations from Dr. McIntyre and Ms. Swigert, and the LEA's Integrated Report.

b. An additional number of hours equal to the number of hours that the student would have been eligible for ESY, had the ARC considered and determined the need for ESY services in the Summer of 2003. If the ARC is unable to reach consensus on the ESY determination, then the number of hours will be equal to the number of hours in the Summer 2003 ESS program that the Principal referred the student to in May 2003.

3. The compensatory education services awarded above shall be offered to the student in the form of

before and/or after school tutoring, and services over the summer break. The LEA will have the discretion to choose the student's tutors, but the LEA shall provide the services under the direction of a reading specialist familiar with the student's IEP and with his specific needs in the area of reading and language skills.

4. The compensatory education should be offered in as intensive an amount of time as the student can tolerate to receive maximum benefit without the services becoming aversive or punitive to the student. The LEA shall invite the student's psychologist to the ARC meeting to assist in the determination of the amount of time the student can tolerate. The LEA is to pay a reasonable fee to the psychologist to attend the meeting if payment is necessary to procure his attendance.

4 [sic]. All other forms of requested relief are denied.

SO ORDERED this the 30th day of January, 2004.

/s/ P L Weeks
Pamela L. Weeks
Due Process Hearing Officer

NOTICE OF RIGHT TO APPEAL

Either party may appeal this decision by sending such a written appeal by certified mail within thirty (30) calendar days of the entry of this Decision and Order to the opposing party and to the Chairperson,

Exceptional Children Appeals Board, Kentucky Department of Education, Capital Plaza Tower, 500 Mero Street, Frankfort, Kentucky 40601.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was mailed by certified mail to counsel for each party and to the Division of Exceptional Children Services, Kentucky Department of Education this 31st day of January, 2004.

/s/ P L Weeks
Pamela L. Weeks

Exhibit List for /Case No. 0203-22

A (1998-1999) Kindergarten

J 1.)	EXHIBIT A-1	BTW Kindergarten report card (4 pages) #1
J 2.)	EXHIBIT A-2	School medical examination form (1 page) #5
J 3.)	EXHIBIT A-3	Immunization Certificate (1 page) #6
J 4.)	EXHIBIT A-4	Census Activity Form (1 page) #7
J 5.)	EXHIBIT A-5	Medicaid Card (1 page) #8
J 6.)	EXHIBIT A-6	Hearing Screening (1 page) #9
J 7.)	EXHIBIT A-7	Kindergarten Testing Sheet (1 page) #10

P 8.)	EXHIBIT A-8	As a kindergarten class we have written (1 page) #11
P 9.)	EXHIBIT A-9	Writing Sample 5-25-99 (2 pages) #12
J 10.)	EXHIBIT A-10	Writing 1 to 10 (5 pages) #14
P 11.)	EXHIBIT A-11	Kindergarten Screening Test (2 pages) #19
P 12.)	EXHIBIT A-12	Student Progress 2001 (1 page) #21
P 13.)	EXHIBIT A-13	Drawing and Writing Sample (3 pages) #22

B (1999-2000) 1st Grade

J 1.)	EXHIBIT B-1	BTW 1st grade report card (3 pages) #25
J 2.)	EXHIBIT B-2	Gates-MacGinitie Reading Tests (3 pages) #28
J 3.)	EXHIBIT B-3	BTW tardy letter (1 page) #31
P 4.)	EXHIBIT B-4	FCPS Authorization for release of information (1 page) #32
J 5.)	EXHIBIT B-5	BTW tardy letter (1 page) #33)
P 6.)	EXHIBIT B-6	Reading recovery program (2 pages) #34

J 7.)	EXHIBIT B-7	BTW tardy letter (1 page) #36
J 8.)	EXHIBIT B-8	1st grade/P1 Form A Math standards test (7 pages) #37

C (2000-2001) 2nd Grade

J 1.)	EXHIBIT C-1	BTW 2nd grade report card (6 pages) #44
J 2.)	EXHIBIT C-2	3.14.00" writing work sample (4 pages) #50
J 3.)	EXHIBIT C-3	8 16 00" writing work sample (1 page) #54
P 4.)	EXHIBIT C-4	Sight word monitoring data (9 pages) #55
J 5.)	EXHIBIT C-5	01/16/01 Diana Cromer letter (1 page) #64
J 6.)	EXHIBIT C-6	02/09/01 Absences letter (1 page) #65
J 7.)	EXHIBIT C-7	02/09/01 Tardy letter (1 page) #66
P 8.)	EXHIBIT C-8	Form 2S School questionnaire for ADHD screening (13 pages) #67
J 9.)	EXHIBIT C-9	Fun With Beads (1 page) #80
P 10.)	EXHIBIT C-10	BTW discipline referral (1 page) #81

P 11.)	EXHIBIT C-11	Standards report (SRI) 5/10/01 (3 pages) #82
P 12.)	EXHIBIT C-12	Elementary Withdrawal Transfer Form (1 page) #85
J 13.)	EXHIBIT C-13	Portfolio Log (kindergarten, 1st, 2nd grades (13 pages) #86
J 14.)	EXHIBIT C-14	2nd grade/p2 form A math standards test (7 pages) #99
J 15.)	EXHIBIT C-15	2nd grade/p2 form B math standards test (7 pages) #106
J 16.)	EXHIBIT C-16	Compare and Contrast (3 pages) #113
P 17.)	EXHIBIT C-17	"Today's Target is 18" work and writing samples (8 pages) #116
P 18.)	EXHIBIT C-18	Inventory Test (4 pages) #124
J 19.)	EXHIBIT C-19	Enrollment form (1 page) #128
J 20.)	EXHIBIT C-20	ADHD Follow-up (Medical Diagnosis) (2 pages) #129

D (2001-2002) 3rd Grade

P 1.)	EXHIBIT D-1	BTW 3rd grade report card (5 pages) #131
P 2.)	EXHIBIT D-2	Standards report (SRI) 09/06/2001 (2 pages) #136
J 3.)	EXHIBIT D-3	BTW parent/teacher conference form 10/22/01 (1 page) #138
P 4.)	EXHIBIT D-4	C. Ely literacy block (6 pages) #139
J 5.)	EXHIBIT D-5	BTW tardy letter 11/30/01 (1 page) #145
P 6.)	EXHIBIT D-6	Level C Phonics a sound approach (16 pages) #146
P 7.)	EXHIBIT D-7	Standards report (SRI) 01/23/2002 (15 pages) #162
P 8.)	EXHIBIT D-8	Parent report star math 02/04/02 (1 page) #177
J 9.)	EXHIBIT D-9	TerraNova individual profile report with TCS/2 (1 page) #178
J 10.)	EXHIBIT D-10	BTW tardy letter 02/11/02 (1 page) #179
P 11.)	EXHIBIT D-11	BTW letter to parent 02/07/02 (1 page) #180
P 12.)	EXHIBIT D-12	BTW letter to parent (reading counts) 02/20/2002 (3 pages) #181

J	13.)	EXHIBIT D-13	Student led conference 02/28/02 (2 pages) #184
P	14.)	EXHIBIT D-14	Open Response 3-1-02 (2 pages) #186
J	15.)	EXHIBIT D-15	BTW Continuation in the primary program form (1 page) #188
J	16.)	EXHIBIT D-16	Running record of text reading 5/10/02 (8 pages) #189
J	17.)	EXHIBIT D-17	Standards report (SRI) 05/21/2002 (4 pages) #197
J	18.)	EXHIBIT D-18	Feature guide for elementary spelling inventory 1 (3 pages) #201
J	19.)	EXHIBIT D-19	BTW attendance report 05/25/01 (2 pages) #204
P	20.)	EXHIBIT D-20	Letter from to Elaine Farris 6/6/02 (1 page) #206
P	21.)	EXHIBIT D-21	Standards report (SRI) 06/10/2002 (16 pages) #207
J	22.)	EXHIBIT D-22	BTW exit conference report 06/04/02 (4 pages) #223
J	23.)	EXHIBIT D-23	Elementary referral for ESS (3 pages) #227
J	24.)	EXHIBIT D-24	3rd grade/P3 math standards assessment tasks (2 pages) #230
P	25.)	EXHIBIT D-25	Writing portfolio contents 2001-2002 (20 pages) #232

J 26.)	EXHIBIT D-26	High frequency words list C (2 pages) #252
P 27.)	EXHIBIT D-27	Language arts and math achievement criteria (3 pages) #254
P 28.)	EXHIBIT D-28	Pretest ESS (9 pages) #257
P 29.)	EXHIBIT D-29	"Dear school mates" writing sample (2 pages) #266

E – Miscellaneous One

P 1.)	EXHIBIT E-1	Interventions and Regression Chart (2 pages) #268
P 2.)	EXHIBIT E-2	Evidence of a "Suspected Disability" (7 pages) #270
P 3.)	EXHIBIT E-3	DSM IV ADHD Criteria (1 page) #283
P 4.)	EXHIBIT E-4	"The Limits of Biological Treatments . . . " (38 pages) #284
P 5.)	EXHIBIT E-5	PEDI-ACTIVE document (2 pages) #322
P 6.)	EXHIBIT E-6	Classroom behavior plan (1 page) #324
P 7.)	EXHIBIT E-7	Proposed behavior plan done by school psychologist Tina Smith (4 pages) #325

F (2002-2003) 4th Grade

J 1.)	EXHIBIT F-1	BTW 4th grade report card (11 pages) #329
J 2.)	EXHIBIT F-2	BTW parent/teacher conference form 8-21-02 (1 page) #340
J 3.)	EXHIBIT F-3	BTW parent/teacher conference form Sept. 4, 02 (1 page) #341
J 4.)	EXHIBIT F-4	BTW parent/teacher conference form 9/10/02 (1 page) #342
P 5.)	EXHIBIT F-5	9/13/02 BTW letter to (1 page) #343
J 6.)	EXHIBIT F-6	BTW parent/teacher conference form Sept. 18, 02 (1 page) #344
P 7.)	EXHIBIT F-7	Student test printout (SRI) 10/03/2002 (6 pages) #345
P 8.)	EXHIBIT F-8	The Wonderful Day (worksheet) (3 pages) #351
P 9.)	EXHIBIT F-9	A Giant in the Forest (worksheet) (3 pages) #354
P 10.)	EXHIBIT F-10	From Peanuts to Peanut Butter (worksheet) (3 pages) #357
P 11.)	EXHIBIT F-11	Email from Joy McKenzie to Annie Farris 09/30/02 (1 page) #360

J	12.)	EXHIBIT F-12	Email from Ms. Vereen to 10/01/02 (1 page) #361
P	13.)	EXHIBIT F-13	Email from to Ms. Farris 10/02/02 (1 page) #362
P	14.)	EXHIBIT F-14	Total reading gains (2 pages) #363
P	15.)	EXHIBIT F-15	Snapshot report (star math) 10/03/02 (2 pages) #365
P	16.)	EXHIBIT F-16	Performance report (SRI) 10/03/2002 (3 pages) #367
P	17.)	EXHIBIT F-17	Letter Ms. Berry to SRI practice (15 pages) #370
J	18.)	EXHIBIT F-18	10/11/02 letter of conf. summary to (2 pages) #385
P	19.)	EXHIBIT F-19	10/11/02 BTW letter (discipline write up) (1 page) #387
P	20.)	EXHIBIT F-20	BTW parent/teacher conference form 10/23/02 (1 page) #388
J	21.)	EXHIBIT F-21	BTW Student assistance team referral 11-6-02 (1 page) #389
J	22.)	EXHIBIT F-22	BTW parent/teacher conference form 11/12/02 (1 page) #390

P 23.)	EXHIBIT F-23	Email from Merrylyn Smith to 10/15/02 (1 page) #391
P 24.)	EXHIBIT F-24	Email from Ms. Smith to 10/17/02 (1 page) #392
P 25.)	EXHIBIT F-25	Email from Ms. Smith to 10/18/02 (2 pages) #393
P 26.)	EXHIBIT F-26	Letter from Ms. Farris to 10/23/02 (1 page) #395
P 27.)	EXHIBIT F-27	Email from to Ms. Vereen 10/25/02 (1 page) #396
P 28.)	EXHIBIT F-28	Email from Ms. Smith to 10/25/02 (1 page) #397
P 29.)	EXHIBIT F-29	Email from Ms. Smith to 10/25/02 (1 page) #398
P 30.)	EXHIBIT F-30	Letter given by Tina Smith given 11/07/02 (1 page) #399
P 31.)	EXHIBIT F-31	Email from Ms. Smith to 11/20/02 (1 page) #400
P 32.)	EXHIBIT F-32	Email from Ms. Smith to 11/20/02 (1 page) #401

P 33.)	EXHIBIT F-33	Letter from to Ms. Farris 11/18/02 (7 pages) #402
P 34.)	EXHIBIT F-34	Letter from Ms. Farris to 11/22/02 (1 page) #409
P 35.)	EXHIBIT F-35	Email from to Ms. Farris 11/23/02 (1 page) #410
P 36.)	EXHIBIT F-36	Email from Ms. Vereen to 11/25/02 (1 page) #411
P 37.)	EXHIBIT F-37	Letter from Ms. Farris to 11/25/02 (1 page) #412
P 38.)	EXHIBIT F-38	Letter from Ms. Farris to 11/26/02 (1 page) #413
P 39.)	EXHIBIT F-39	BTW student discipline report 11/26/02 (1 page) #414
J 40.)	EXHIBIT F-40	Email from to Ms. Smith 12/02/02 (2 pages) #415
J 41.)	EXHIBIT F-41	Email from to Ms. Vereen 12/09/02 (1 page) #417
P 42.)	EXHIBIT F-42	Letter from to Ms. Farris 12/09/02 (8 pages) #418

P	43.)	EXHIBIT F-43	Email from to Ms. Vereen 12/12/02 (1 page) #426
J	44.)	EXHIBIT F-44	Email from Ms. Smith to 12/13/02 (3 pages) #427
P	45.)	EXHIBIT F-45	Email from Ms. Smith to 12/13/02 (2 pages) #430
J	46.)	EXHIBIT F-46	Letter from to Ms. Farris 12/16/02 (1 page) #432
J	47.)	EXHIBIT F-47	Email from to Ms. Smith 12/16/02 (3 pages) #433
P	48.)	EXHIBIT F-48	Letter from Ms. Mobley to 01/08/03 (1 page) #436
P	49.)	EXHIBIT F-49	Letter from Fleur Hosseini to 01/08/03 (1 page) #437
P	50.)	EXHIBIT F-50	Student progress report (SRI) 01/14/03 (9 pages) #438
J	51.)	EXHIBIT F-51	Letter from to Ms. Mobley 01/14/03 (1 page) #447
J	52.)	EXHIBIT F-52	Email from Ms. Vereen to 01/17/03 (1 page) #448

P 53.)	EXHIBIT F-53	Parent Report star math 01/21/03 (1 page) #449
J 54.)	EXHIBIT F-54	Email from Ms. Farris to 01/24/03 (2 pages) #450
P 55.)	EXHIBIT F-55	BTW student discipline report 01/27/03 (2 pages) #452
P 56.)	EXHIBIT F-56	Email from Ms. Smith to 01/28/03 (1 page) #454
P 57.)	EXHIBIT F-57	Letter from to Ms. Peyton 01/29/03 (1 page) #455
J 58.)	EXHIBIT F-58	FCPS referral for special education (01/29/03) (8 pages) #456
J 59.)	EXHIBIT F-59	BTW parent/teacher conference form Jan. 30, 03 (3 pages) #464
J 60.)	EXHIBIT F-60	FCPS ARC meeting summary/documents 2/5/03 (33 pages) #467
J 61.)	EXHIBIT F-61	FCPS consent to evaluate form 02/05/03 (1 page) #499
P 62.)	EXHIBIT F-62	"Major concerns students with ADHD have . . . " (14 pages) #501
P 63.)	EXHIBIT F-63	BTW detention form 2-5-03 (1 page) #515

P 64.)	EXHIBIT F-64	3/5/2003 SRI letter "dear parent or caregiver" (2 pages) #516
P 65.)	EXHIBIT F-65	BTW detention form 3-5-03 (1 page) #518
J 66.)	EXHIBIT F-66	BTW parent/teacher conference form Mar. 5, 2003 (1 page) #519
J 67.)	EXHIBIT F-67	BTW parent teacher conference form 3-5-03 (1 page) #520
J 68.)	EXHIBIT F-68	FCPS social developmental history (3 pages) #521
J 69.)	EXHIBIT F-69	Email from to Ms. Vereen 03/10/03 (1 page) #524
P 70.)	EXHIBIT F-70	Compuscore Version 1.1b score report (GE) (1 page) #525
P 71.)	EXHIBIT F-71	Compuscore Version 1.1b score report (AE) (1 page) #526
P 72.)	EXHIBIT F-72	Behavior monitoring data March 11, 2003 (23 pages) #527
P 73.)	EXHIBIT F-73	Letter from Ms. Peyton to 3/17/03 (1 page) #550
P 74.)	EXHIBIT F-74	BASC parent rating scales 3-20-03 (1 page) #551

P 75.)	EXHIBIT F-75	Conners parent rating scale 3/02/03 (1 page) #552
P 76.)	EXHIBIT F-76	Letter from to Ms. Peyton 03/25/03 (1 page) #553
P 77.)	EXHIBIT F-77	ADHD parent interview form 03/24/03 (6 pages) #554
P 78.)	EXHIBIT F-78	FCPS Functional behavioral assessment 3-28-03 (11 pages) #560
P 79.)	EXHIBIT F-79	BTW detention form 04/02/03 (1 page) #571
J 80.)	EXHIBIT F-80	Email from Ms. Vereen to 04/14/03 (1 page) #572
P 81.)	EXHIBIT F-81	Email from to Ms. Farris 04/15/03 (1 page) #573
P 82.)	EXHIBIT F-82	BTW detention form 04/16/03 (1 page) #574
J 83.)	EXHIBIT F-83	BTW parent/teacher conference form 4-16-03 (1 page) #575
P 84.)	EXHIBIT F-84	Light's Retention Scale 04/21/03 (3 pages) #576
J 85.)	EXHIBIT F-85	Email from Ms. Vereen to 04/22/03 (2 pages) #579

P 86.)	EXHIBIT F-86	Draft copy of FCPS Integrated Report 04/22/03 (15 pages) #581
P 87.)	EXHIBIT F-87	Letter from to Ms. Boggs 04/23/03 (3 pages) #596
J 88.)	EXHIBIT F-88	FCPS Occupational therapy evaluation 04/24/03 (2 pages) #599
J 89.)	EXHIBIT F-89	Email from Ms. Vereen to Mr. 04/28/03 (1 page) #601
P 90.)	EXHIBIT F-90	BTW student disciplinary referral 04/25/03 (1 page) #602
J 91.)	EXHIBIT F-91	FCPS Integrated Report 04/28/03 (17 pages) #603
P 92.)	EXHIBIT F-92	Email from Mr. to Ms. Peyton 04/29/03 (1 page) #620
P 93.)	EXHIBIT F-93	Email from Mr. to Ms. Boggs 04/30/03 (1 page) #621
J 94.)	EXHIBIT F-94	BTW parent/teacher conference form 05/01/03 (1 page) #622
P 95.)	EXHIBIT F-95	Email from Ms. Boggs to 05/01/03 (2 pages) #623

P 96.)	EXHIBIT F-96	Email from Mr. Muncy to 05/02/03 (2 pages) #625
P 97.)	EXHIBIT F-97	Email from Ms. Aker to 05/02/03 (2 pages) #627
P 98.)	EXHIBIT F-98	FCPS PLEPs proposal in the 2/5/03 ARC meeting (7 pages) #629
P 99.)	EXHIBIT F-99	FCPS revised PLEPs proposals (2 pages) #636
P 100.)	EXHIBIT F-100	Reading progress update 05/05/2003 (1 page) #638
J 101.)	EXHIBIT F-101	FCPS ARC meeting summary/document 5/5/03 (18 pages) #639
J 102.)	EXHIBIT F-102	BTW student discipline referral 05/06/03 (1 page) #667
P 103.)	EXHIBIT F-103	Student progress report (SRI) 05/07/03 (1 page) #668
J 104.)	EXHIBIT F-104	FCPS ARC meeting summary/document 5/7/03 (12 pages) #669
J 105.)	EXHIBIT F-105	FCPS IEP proposals for goals/objectives 5/9/03 (6 pages) #681
J 106.)	EXHIBIT F-106	FCPS IEP proposals for goals/objectives 5/9/03 (6 pages) #687

J 107.)	EXHIBIT F-107	FCPS IEP proposals for goals/objectives 5/9/03 (1 page) #693
J 108.)	EXHIBIT F-108	FCPS ARC meeting summary/document 5/9/03 (35 pages) #694
J 109.)	EXHIBIT F-109	Letter from to Ms. Boggs 5/9/03 (12 pages) #730
P 110.)	EXHIBIT F-110	Example BIP from school psychologist (4 pages) #743
J 111.)	EXHIBIT F-111	FCPS ARC meeting summary/document 5/13/03 (9 pages) #747
J 112.)	EXHIBIT F-112	FCPS ARC meeting summary/document 5/14/03 (23 pages) #756
P 113.)	EXHIBIT F-113	Final IEP PLEPS/goals/ objectives 5/14/03 (12 pages) #779
J 114.)	EXHIBIT F-114	Letter from Mr. to Ms. Farris 05/20/03 (1 page) #791
P 115.)	EXHIBIT F-115	FCPS BIP developed outside ARC on 5/20/03 (5 pages) #792
P 116.)	EXHIBIT F-116	4th grade writing portfolio (8 pages) #797

P 117.)	EXHIBIT F-117	Mr. Muncy prior written notice letter 05/23/03 (17 pages) #805
P 118.)	EXHIBIT F-118	Parent report star math 05/27/03 (3 pages) #822
P 119.)	EXHIBIT F-119	Letter from Mr. to Ms. Boggs 05/27/03 (1 page) #825
J 120.)	EXHIBIT F-120	Email from Mr. to Ms. Farris 05/30/03 (1 page) #826
J 121.)	EXHIBIT F-121	Email from Mr. to Mr. Muncy 06/01/03 (1 page) #827
J 122.)	EXHIBIT F-122	Email from Mr. to Ms. Blanton 6/02/03 (1 page) #828
P 123.)	EXHIBIT F-123	Email from Tina Smith to 6/10/03 (1 page) #829
P 124.)	EXHIBIT F-124	Standards report (SRI) 06/11/03 (5 pages) #830
J 125.)	EXHIBIT F-125	Student Progress 2001 (1 page) #835
J 126.)	EXHIBIT F-126	BTW attendance report (2 pages) #836
P 127.)	EXHIBIT F-127	Letter from Ms. Dobbins [illegible]/18/03 (1 page) #838

P 128.)	EXHIBIT F-128	Letter from to Dr. Tennant 8/01/03 (1 page) #839
P 129.)	EXHIBIT F-129	Pre-referral intervention strategies (3 pages) #840

G – Miscellaneous 2

P 1.)	EXHIBIT G-1	Petitioner's Chronology (11 pages) #843
P 2.)	EXHIBIT G-2	Report of Evaluation from Ms. Nancy Swigert (5 pages) #854
P 3.)	EXHIBIT G-3	Nancy B. Swigert's Curriculum Vitae (16 pages) #859
P 4.)	EXHIBIT G-4	Dr. John Sander's Curriculum Vitae (6 pages) #875
P 5.)	EXHIBIT G-5	Samples of tutoring outlines by Mr. (11 pages) #881
P 6.)	EXHIBIT G-6	Lesson plan given by Ms. Vereen to Mr. (2 pages) #892
P 7.)	EXHIBIT G-7	Information on reading programs (200 pages) #894
P 8.)	EXHIBIT G-8	Report on Reading Proficiency from Dr. McIntyre (16 pages) #1094

P 9.)	EXHIBIT G-9	Audio tape of Dr. McIntyre's session with (1 tape sides A/B)
P 10.)	EXHIBIT G-10	BIP evidence from KDE DECS Case No. 0001-31 (4 pages) #1110
P 11.)	EXHIBIT G-11	Dr. Karen DeMoss' Curriculum Vitae (1 page) #1114
P 12.)	EXHIBIT G-12	Document "Daily Report Cards" (4 pages) #1115
P 13.)	EXHIBIT G-13	Dr. Ellen McIntyre's Curriculum Vitae (7 pages) #1119
P 14.)	EXHIBIT G-14	Training materials on BIPs provided by FCPS (98 pages) #1126
P 15.)	EXHIBIT G-15	Ms. Vereen's grade book for (49 pages) #1225
P 16.)	EXHIBIT G-16	Great Leaps documentation from Serita Baskin (3 pages) #1274
P 17.)	EXHIBIT G-17	FCPS' Child Find System dated December 1997 (9 pages) #1277
P 18.)	EXHIBIT G-18	FCPS' Child Find System dated January 2002 (4 pages) #1286
J 19.)	EXHIBIT G-19	FCPS ARC meeting summary/documents 09/16/03 #1290

J 20.)	EXHIBIT G-20	FCPS ARC meeting summary/documents 09/16/03 #1318
J 21.)	EXHIBIT G-21	FCPS ARC meeting summary/documents 09/25/03 #1361
J 22.)	EXHIBIT G-22	FCPS ARC meeting summary/documents 10/02/03 #1395
LEA 23.)	LEA EXHIBIT 14	Letter from to Ms. Farris, 11/12/03 (2 pages)

v. Fayette County Public Schools
Agency Case No. 0203-22

HEARING OFFICER EXHIBIT LIST

HO EX 1 – Request for Due Process Hearing, 5/13/03

HO EX 2 – Notice of Hearing and Issues

HO EX 3 – Petitioner's Conflict Form

HO EX 4 – Notice of Cancellation of Hearing Date

HO EX 5 – Prehearing Order, 6/11/03

HO EX 6 – Petitioner's Supplemental Statement of Issues

HO EX 7 – Prehearing Order, 7/5/03

HO EX 8 – Respondent's Motion/Memorandum in Support of Dismissal of Request for Relief

HO EX 9 – Petitioner's Response to Respondent's Motion/Memorandum in Support of Dismissal of Request for Relief

HO EX 10 – Order Denying Motion for Dismissal of Request for Relief

HO EX 11 – Petitioner's motion and correspondence requesting an order for production of documents, 8/22/03

HO EX 12 – Hearing Officer's correspondence to Petitioner requesting clarification of motion, 8/25/03

HO EX 13 – Petitioner's Motion for Production of Documents

HO EX 14 – Response by Respondent to Motion for Production of Documents

HO EX 15 – Order for Production of Documents

HO EX 16 – Petitioner's correspondence re: exhibits and chronology, 8/25/03

HO EX 17 – Response by Respondent to Petitioner's Letter "Request" to Revise Chronology

HO EX 18 – Prehearing Order, 9/5/03

HO EX 19 – Notice of Hearing Location

No. 06-5534

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BOARD OF EDUCATION OF FAYETTE, KENTUCKY, Plaintiff-Appellee, v. L.M., AS LEGAL GUARDIAN OF T.D., A MINOR, ET AL., Defendants-Appellants.	)	ORDER (Filed Jul. 5, 2007)

BEFORE: MARTIN, COLE, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

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Filed: July 5, 2007

Robert L. Chenoweth
Chenoweth Law Office
121 Bridge Street
Frankfort, KY 40601

RE: 06-5534
Bd Ed Fayette vs. L. M.
District Court No. 04-00266

Dear Mr. Chenoweth:

Enclosed is a copy of an order which was entered today in the above-styled case.

Very truly yours,
Leonard Green, Clerk

/s/ B L Harris
Beverly L. Harris
Deputy Clerk

Enclosure

cc:
Ms. Marie Allison